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United States
Court of Appeals
for the Ninth Circuit.

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit
County, Washington; WILLIAM B. PAR-
SONS, United States Marshal for the Western
District of Washington; and Honorable HER-
BERT BROWNELL, Attorney General of the
United States,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Northern Division.

FILED

NOV - 1 1955

No. 14833

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KENNETH GLEN MADSEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 149

KENNETH GLEN MADSEN,

Petitioner,

vs.

HAROLD H. HINSHAW the Sheriff of Skagit
County, Washington, and WILLIAM B. PAR-
SONS the United States Marshal for the West-
ern District of Washington, Northern Division,
and The Honorable HERBERT BROWNELL
the Attorney General of the United States,

Respondents.

PETITION FOR A WRIT OF
HABEAS CORPUS

To: The District Court of the United States for the
Western District of Washington, Northern
Division.

Comes Now Kenneth Glen Madsen and respect-
fully petitions this Court for a Writ of Habeas
Corpus, and alleges as follows:

I.

That petitioner is presently confined, imprisoned,
detained and restrained of his liberty in the Skagit
County Jail in Mount Vernon, Washington, as a
Federal prisoner within the territorial jurisdiction
of this Court, by Harold H. Hinshaw who is the

Sheriff of Skagit County, State of Washington, and who has the actual physical custody and control of petitioner, and by William B. Parsons who is the United States Marshal for the Western District of Washington, Northern Division, and who supervises the said Sheriff in regards to the custody and control of the petitioner, and by the Honorable Herbert Brownell, the Attorney General of the United States, who supervises the said Marshal.

II.

That said confinement, imprisonment, detention, and restraint is unlawful and illegal, and the unlawfulness and illegality thereof is more fully described in the facts hereinafter set forth.

III.

That, on or about August 6th, 1954, when petitioner was sixteen years old, he became involved in a happening at Ketchikan, Alaska, which resulted in his being incarcerated in the Ketchikan Federal jail, and petitioner has been, ever since said date, continuously incarcerated.

IV.

That, on or about October 25, 1954, petitioner was, as a result of the above-mentioned happening, indicted by a Grand Jury, sitting for the Federal District Court of Alaska, Division Number One at Ketchikan, being charged with the crime of First Degree Murder, which crime carries with it, unless qualified by the jury, a mandatory death penalty.

V.

That the charging part of the said indictment reads as follows:

No. 1652-KB

Indictment

Viol. Sec. 65-4-1 ACLA 1949

(Murder in the First Degree)

The Grand Jury Charges:

That on or about the 6th day of August, 1954, at Ward Cove, Ketchikan, Division Number One, Territory of Alaska, and within the jurisdiction of this Court, Kenneth Glen Madsen did, with Deliberate and premeditated malice, kill Raymond Tamatsu Aria by shooting the said Raymond Tamatsu Aria.

A True Bill.

STUART RUSSELL,

Foreman.

VI.

That as a result of the above-mentioned happening of August 6th, 1954, petitioner, without delay, employed competent counsel of his own choosing to represent him, and petitioner was continuously represented by such counsel for a period of approximately three months, and right up to the day petitioner's trial for First Degree Murder was to commence, that is, November 26th, 1954.

VII.

That petitioner's attorney was well qualified as a trial lawyer and wholly capable of adequately

representing petitioner. That petitioner's attorney had been actively engaged in the practice of law for twenty-eight years. That petitioner's attorney had, for a period of approximately three months, investigated and reinvestigated petitioner's case, had many times thoroughly retraced the exact steps and actions of all persons who were involved in any manner in the case, had taken meticulous notes concerning all things and matters relevant to the case, had taken complete and detailed statements from the witnesses, had caused a special home interview to be taken of one of the most highly qualified autopsy surgeons in the United States who had performed well over seven thousand autopsies and who had testified in courts many times as an expert witness in his field. In fact he had participated in over three hundred homicide cases as an expert witness, and as a result petitioner's attorney had secured invaluable medical information from said expert, wholly beneficial to petitioner. Said attorney had secured authoritative medical books from said expert's personal library to aid in properly and adequately preparing a physician in Alaska to testify on behalf of petitioner. That said information and books were transported to Alaska, and a qualified practicing physician in Alaska was, by their use, thoroughly prepared to testify on behalf of petitioner as an expert witness on an issue of vital importance to petitioner's defense. That petitioner's attorney had on several occasions discussed the case with the government attorneys in charge, he had read and studied all points of law which

might be involved in the case, he had prepared many skillfully drawn jury instructions and had prepared himself with authoritative cases to support the giving of the same; he had prepared an outline of trial procedure and tactics to be followed during the course of the trial. Petitioner's attorney was thoroughly and completely prepared to proceed to trial on petitioner's behalf, and pursuant to petitioner's wishes.

VIII.

That on November 26, 1954, without notice to petitioner or petitioner's attorney, petitioner was, by the District Court of Alaska, the Honorable George W. Folta presiding improperly, summarily, capriciously, and arbitrarily refused the right to be heard by his attorney. That petitioner did not learn that he was not going to be allowed to be represented by his attorney until the afternoon of November 26, 1954, when petitioner was taken before the Court for the sole purpose of trial, and it was not until then that petitioner was advised of the Court's action. As a result petitioner was bewildered and confused, and sick at heart, and when he sought the guiding hand of his attorney, who was present in the courtroom, the Court, without cause, refused him the right to even communicate with his attorney in any manner whatsoever. That, as a consequence of the Court's actions, petitioner was deprived of his unqualified right to be represented by counsel of his own choosing. Petitioner was thereby greatly prejudiced in the defense of his case, all in clear violation of petitioner's sub-

stantive rights, as provided by the juvenile laws of Alaska, and as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. That the arbitrary acts of said Court in denying petitioner the assistance of counsel of his own choosing for his defense further violated petitioner's substantive rights as guaranteed by the Sixth Amendment to the United States Constitution. Therefore, the Court was, by its actions, completely deprived of jurisdiction over petitioner, if ever it had any.

IX.

That there is provided in Title 51 of the Alaska Compiled Laws Annotated, a certain chapter concerning juveniles, and designated as Chapter No. 3. That this chapter is divided into nineteen sections, numbering 1 to 19. That this chapter was the law of Alaska on August 6, 1954, and has been ever since that date. That the purpose of this chapter is set forth in Section 1, as follows:

“Purpose of Act. The purpose of this Act is to secure for each child such care and guidance as nearly as possible equivalent to that which should be given by his parents.

“The principle is hereby recognized that children under the jurisdiction of the court are wards of the Territory, subject to discipline and entitled to the protection of the Territory, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them.”

That the construction to be placed on this chapter is set out in Section No. 2 as follows:

“Construction of Act. The Act shall be liberally construed to accomplish the purpose herein sought.”

That jurisdiction over juveniles is set forth in Section 3 as follows:

“Jurisdiction. Jurisdiction in cases of children under 18 years of age shall be vested in the Justice Court, which shall have exclusive original jurisdiction in proceedings concerning any child residing in this Territory who (1) has violated any law of the United States or the Territory or any ordinance or regulation of a subdivision of the Territory; (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; (3) is habitually truant from school or home, or habitually so deports himself as to injure or endanger the morals or health of himself or others; (4) is abandoned by his parent, guardian or custodian; (5) lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian; (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others; (7) is mentally deficient or in need of special care or training provided his parent or guardian consents in writing that such child comes within the provisions of this Act.

“The Justice Court shall also have exclusive jurisdiction in any controversy arising over the custody of a child, and to appoint a guardian of the person and property of any child within its jurisdiction.

“Provided, that such jurisdiction provision shall not be applicable in divorce or separate maintenance cases arising in the District Court, but in such cases the District Judge may, if he deems it best for the welfare of a child involved, order the child turned over to the custody of the Welfare Department. In such event the Welfare Department shall receive such support money as is ordered to be paid by the court and use same to carry out suitable arrangements for the child.”

That an investigation into a juvenile's background is required in every case coming before the Justice Court, and the procedure to be followed in connection therewith is set forth in Section 4, as follows:

“Procedure: Preliminary Investigation: Petition. Whenever any person shall give to the court information that a child comes within the provisions of this Act, the court shall make inquiry to determine whether the interests of the public or the child require formal proceedings in the case. Such inquiry shall include a preliminary investigation of the home and environmental situation of the child, his previous history, and the circumstances of the condition alleged. The court shall have power to designate a competent person or agency to assist in

making the preliminary investigation. If after the completion of such inquiry the court shall determine that further proceedings should be had, it shall order that a petition be filed, alleging briefly the facts which bring said child within the provisions of this Act, and setting forth the name, birthplace, birthdate and residence of the child, the names and residences of his parents, or his legal guardian, and if there be none, the name of the person or persons having custody or control of the child, and the name of the nearest known relative if no parent or guardian can be found. If any of the facts herein required are not known by the petitioner, the petition shall so state. The petition shall be sworn to by the person or persons presenting same."

That Sections 5, 6, 7 and 8 prescribe that a hearing be held on the petition required to be filed by section 4, and also prescribe the procedure to be followed to initiate such a hearing. That section 9 prescribes the method by which the Justice Court may waive jurisdiction over a juvenile, and reads as follows:

"Waiver of Jurisdiction. If a child is charged with an offense which, if committed by an adult, would constitute a felony, the court after full investigation may waive the jurisdiction vested in it by this Act, and order such child held to await action by the grand jury; otherwise, the court shall proceed as herein provided."

That the method of conducting of the hearing contemplated by sections 5, 6, 7 and 8, and the judg-

ments or orders to be entered pursuant thereto, and other matters of a consequential concern to juveniles, are set forth in section 10, as follows:

“Hearing and Judgment or Order: The court may conduct the hearing in an informal manner in chambers or otherwise and may adjourn the hearing from time to time. In the hearing of any case, the public shall be excluded, but for good and sufficient reasons compatible with the best interests of the child, may permit others to be present.

“Proceedings under this Act shall be without jury and the rules of evidence may be relaxed.

“If the court shall find the child falls within any of the provisions of this Act, an order shall be duly entered:

“(1) Committing the child to the Territorial Department of Public Welfare; or

“(2) Releasing the child to the care and custody of the parent, guardian, or other suitable person, under the supervision of the Department of Public Welfare.

“No adjudication upon the status of any child shall operate to impose any of the civil disabilities imposed by conviction upon a criminal charge, nor shall any child be deemed a criminal by such adjudication, nor shall such adjudication be deemed a conviction, nor shall any child be charged with or convicted of a crime in any court, except as provided in Section 9 of this Act [§51-3-9 herein]. The

disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceedings, nor shall such disposition or evidence operate to disqualify a child in any future civil service examination or appointment in the Territory.

“Upon entering an order of commitment the Court shall transmit a copy of its information and findings, together with the order of commitment to the Department of Public Welfare to which the child has been committed.”

X.

That Chapter 3 of Title 51 of the Alaska Compiled Laws Annotated (1949) sets forth requirements concerning juveniles that are jurisdictional in nature; that full and complete strict compliance with the type of investigation and hearing therein prescribed is an indispensable prerequisite that must be followed by the Justice Court before it may waive jurisdiction over a juvenile. That perfect compliance with the methods prescribed for waiver of jurisdiction over a juvenile, by the Justice Court, is an indispensable prerequisite to any other court obtaining jurisdiction over a juvenile. That Petitioner has unlawfully been totally denied every and all rights guaranteed to him under the said Chapter 3, all to his extreme prejudice. That Petitioner has never, by word or action, waived any of the rights guaranteed to him under Chapter 3. That, even if Petitioner had desired to waive his rights under Chapter 3, it was not within his power to do so,

because, the rights guaranteed Petitioner, under Chapter 3, may not, under any circumstances, be waived by petitioner or anyone else including the courts of Alaska. That, as a result of petitioner being denied his rights as guaranteed by the said Chapter 3, the District Court of Alaska was without jurisdiction even to make the record under which petitioner is now committed to serve twenty-five years of his life in prison, and petitioner, as a consequence, has been illegally divested of his substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

XI.

That petitioner is now seventeen years old and has only an eighth-grade education. That after petitioner was placed in custody in Ketchikan, his mother went to the jail and asked to see him, but this request was arbitrarily and unjustly denied, and petitioner's mother thereafter passed away without being able to see petitioner. Petitioner's father was also arbitrarily and unjustly denied the right to see petitioner until after petitioner was committed to await action of the Grand Jury, on a charge of Murder in the First Degree. That petitioner has not committed and is not guilty of the crime of First Degree Murder or any crime lawfully included therein, or any crime at all. That no evidence exists which could establish that petitioner is guilty of having committed a crime. That, at a fair trial, petitioner could establish his innocence.

XII.

That petitioner in the midst of his perplexities sought a reasonable continuance in order that he might obtain another competent attorney of his own choosing to represent him, but petitioner's request was, by the Court, abruptly, unjustly, wrongfully, and against all American standards of fair-play dogmatically denied. The Court was thoroughly informed that petitioner could and would obtain counsel of his own choosing if given a reasonable opportunity to do so. That, as a result of these disconcerting actions of the Court, petitioner was elevated to the pinnacle of prejudice, and contrary to the spirit of the law and against public policy. Petitioner was unlawfully left to stand alone in a United States Court, to face immediate trial, without counsel of his own choosing, without guardian, and without next of friend, on a charge of Murder in the First Degree, in positive violation of petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and in flagrant violation of petitioner's substantive right to have the assistance of counsel of his own choosing for his defense as guaranteed by the Sixth Amendment to the United States Constitution, and as a result, the Court, by operation of law, was severed of all jurisdiction, if it ever had any.

XIII.

That petitioner was compelled, against his will, pursuant to definite directions of the Court, to take

a pauper's oath, so that the Court might appoint counsel, not of petitioner's choosing, to represent petitioner. The Court had been fully advised that petitioner was capable of obtaining his own counsel, and petitioner knew, at the time he took this pauper's oath that, in so doing, he was acting under coercion and was swearing falsely and the Court also knew that the petitioner was committing a wrong, but the petitioner had no choice, because the Court would not alter its imperious attitude. This action, by the Court, was in direct violation of petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and of petitioner's substantive right to be represented by counsel of his own choosing as guaranteed by the Sixth Amendment to the United States Constitution, and by this action the Court lost all jurisdiction in the case, if it ever had any.

XIV.

That the Court then proceeded, wholly against petitioner's wishes, to appoint counsel to represent him. That petitioner then requested of the Court that a certain attorney be appointed. That this certain attorney was formerly a U. S. District Attorney and was, beyond doubt, the best qualified attorney practicing criminal law in Ketchikan, Alaska. The Court inquired of this attorney and was informed by this attorney that the time allowed for preparation was too short and that this attorney did not know under such circumstances whether or not he could stand up under the physical strain,

although he informed the Court that it would be different if ample time were allowed. The Court again, without justification, refused to continue petitioner's case and proceeded against petitioner's wishes and appointed two unqualified, inadequate, inexperienced and incompetent young attorneys to represent petitioner. This was done in spite of the fact that these same two attorneys had, only minutes previously, stated in open Court, among other things, that they did not want to have anything to do with petitioner's case, and that in no event would they go to trial on petitioner's behalf, and that petitioner did not want them to have anything to do with his case. The Court ordered these two attorneys to be ready to go to trial within nine days. Petitioner was thereby effectively and unlawfully denied the right to employ competent counsel of his own choosing. These proceedings of the Court whereby these two attorneys were appointed to represent petitioner, were clearly prejudicial to petitioner and in violation of petitioner's plain wishes as stated in open court. Petitioner's substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution were thereby transgressed and petitioner's substantive right to be represented by competent counsel of his own choosing as guaranteed by the Sixth Amendment to the Constitution of the United States was effectively denied. The Court was thereby deprived of all jurisdiction, if it ever had any.

XV.

That these two Court-appointed attorneys sought to have the petitioner's case continued for a reasonable time in order that they might attempt to prepare themselves. The Court again, without just cause, arbitrarily denied this request. The Court then ordered these two attorneys not to communicate with petitioner's ousted attorney, and not to avail themselves of any of the products of his labor, and the Court then warned these two attorneys, that if they violated this order, they would be held in contempt of Court. This display by the Court was such a despotic misuse of judicial power that it deprived petitioner of a fair trial; and it was an open violation of petitioner's substantive rights as guaranteed under the due process clause of the Fifth Amendment to the United States Constitution, thereby depriving the Court of jurisdiction, if it ever had any.

XVI.

That these two court-appointed attorneys, although well-qualified to individually represent persons in trials in many different types of civil actions, were wholly inexperienced, incompetent and inadequate to represent petitioner in this trial on a charge of Murder in the First Degree, and the Court knew this. That due to their deficient qualifications and lack of experience in handling criminal cases and the fact that the Court would not allow them ample time to prepare, and since they were foreclosed from communicating with or using the material gathered by petitioner's ousted counsel,

they were forced to enter upon the trial of petitioner's cause unprepared. The unavoidable consequential result was that petitioner's trial attempt was a farce, sham, and a mockery of justice. In the preparation of petitioner's case and in the courtroom performance on behalf of petitioner, petitioner's court appointed counsel, fell below the very minimum standards required of an attorney defending a person charged with a capital offense. As a result of the incompetent and inadequate representation of petitioner by his court-appointed counsel, petitioner was effectively deprived of the substantive right of due process of law as guaranteed by the Fifth Amendment to the United States Constitution, and the court was thereby deprived of all jurisdiction, if it ever had any.

XVII.

That, of these two attorneys, the one with the wider experience told petitioner, just minutes before he was appointed to represent petitioner, that he did not want to handle petitioner's case, and that he was not qualified for a murder trial. Subsequent to his appointment he informed petitioner that he did not like the case but that he was "stuck" with it, that he did not want to go to trial on behalf of petitioner, that he was a civil lawyer and not a criminal lawyer, that if petitioner went to trial he would lose the case, that he didn't see how he could get petitioner off, that the most petitioner could hope for would be a verdict of guilty of Second Degree Murder and that he would get thirty years

on that, and petitioner would probably be convicted of First Degree Murder and would either get life imprisonment or would be sentenced to death. He also told petitioner that the prosecution's case was very strong and that petitioner's case was very weak. He advised and begged petitioner to plead guilty. He also advised petitioner that during the noon recess of petitioner's first day of trial, and before the jury had been selected, he had met Judge Folta on the street and that the Judge said: "Why don't you settle this?", to which petitioner's court-appointed counsel answered, "I would, but the District Attorney and I are a few years apart on the sentence," to which the Judge replied: "Well, unless you've got a case, I'd settle it, and I can't see where you have a case." Petitioner's court-appointed counsel told petitioner that if he went to trial he would absolutely get no less than thirty years, whereas if he pleaded guilty, he thought the Judge might bring the sentence down to fifteen years, because that was the impression the Judge gave petitioner's attorney on the street. That all of these statements and representations made to petitioner by his court-appointed counsel and all statements by the Judge to petitioner's court-appointed counsel were designed to coerce petitioner into pleading guilty against his will. Petitioner did not want to plead guilty, but he was in absolute ignorance of what was going on in connection with his trial, except of what his court-appointed counsel advised him. Petitioner was incapable, because of his incarceration youth, inexperience, and lack of

knowledge, of making an intelligent decision concerning his rights. Petitioner was incapable of protecting his own interests or of assuming legal obligations, or defending legal rights. Petitioner was unable to assert his rights through competent counsel of his own choosing and he was entirely unversed in the law, and unqualified and unable to represent himself in these criminal proceedings. Petitioner had no qualities of learning or experience calculated to enable him to protect himself in the give-and-take of a courtroom trial. As a natural result of this coercion and these improper inducements, petitioner was, through fear, misrepresentation, ignorance, lack of knowledge of our spoken language, lack of knowledge of the ways of judicial procedure, persuasion based on false statements, lack of comprehension of the consequences of his act, and youth, blindly led into entering a plea of guilty, if one was entered, to the crime of Second Degree Murder, although he was innocent, and petitioner was thereby deprived of his substantive right to a fair trial on the law and evidence, which was a denial to petitioner of his constitutional rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution, and the Court was thereby deprived of jurisdiction, if it ever had any.

XVIII.

Petitioner was, because of his incompetent and inadequate representation, unlawfully prevented from going to trial and presenting his valid defenses to a jury, all in violation of petitioner's substantive

rights as guaranteed under the due process clause of the Fifth Amendment to the United States Constitution, and the Court was thereby deprived of jurisdiction, if it ever had any.

XIX.

That the statute hereafter set out was the law of Alaska on August 6, 1954, and has been ever since, and may be found in the Alaska Compiled Laws Annotated, Title 66, Chapter 12, Section 3, as follows:

“Plea of Guilty: How Put In. That a plea of guilty must in all cases be put in by the defendant in person, in open court, unless upon an indictment against a corporation, in which case it may be put in by counsel.”

XX.

That petitioner never withdrew his plea of not guilty, and it still stands valid, to the indictment charging him with First Degree Murder, leaving the issue of petitioner's guilt or innocence undetermined. That petitioner was never convicted of the crime of First Degree Murder, or any crime lawfully included therein. That petitioner never, in person, or otherwise, consciously or wittingly, entered a plea of guilty to the crime of First Degree Murder, or any other crime lawfully included within the crime of First Degree Murder. That petitioner never has entered a plea of guilty to the crime of Second Degree Murder. That the Court's jurisdiction, if it had any, was not such that it could lawfully adjudge petitioner guilty of any crime or

commit him to the custody of the United States Attorney General. Therefore, the judgment and commitment of the Court was entirely without its jurisdiction, if it had any, and is entirely unlawful and illegal, and petitioner now remains restrained, imprisoned, confined and detained of his liberty in complete violation of his substantive rights as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

XXI.

That the Judgment and Commitment, under the authority of which the petitioner is now imprisoned as a Federal prisoner, is as follows:

In the District Court for the District of Alaska,
Division Number One at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN,

Defendant.

JUDGMENT AND COMMITMENT

On this 7th day of December, 1954, came the attorney for the Government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been found guilty on his plea of Guilty to the crime of Second

Degree Murder, the same being an offense in violation of Section 65-4-3 ACLA 1949 and included in the crime of First Degree Murder as charged in the Indictment filed in the above-entitled case; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

It Is Adjudged that the defendant is Guilty of the crime of Second Degree Murder, the same being an offense included in the crime of First Degree Murder.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty-five (25) Years.

It Is Ordered that the Clerk of this Court deliver a certified copy of this judgment and commitment to the United States Marshal, the Superintendent of the Federal Jail, or other qualified officer and to the defendant and that the copies serve as the sentence of the defendant.

Done in open court this 7th day of December, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

XXII.

That petitioner has complied with Section 2255 of Title 28 of the United States Code Annotated,

in that he has twice sought relief under that section, by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial Court. That Section 2255 has been wholly inadequate and ineffective in petitioner's case. That other matters and circumstances exist which have rendered Section 2255 not only an extreme hardship to petitioner, but also totally ineffective. In fact Judge Folta has refused to permit petitioner's counsel Davis or Davidson to file his petition to vacate the plea of guilty.

XXIII.

That the only adequate and effective remedy now left to petitioner, by which he may correct the manifest injustice of his unlawful and illegal confinement, is Habeas Corpus as guaranteed petitioner by Article I, Section 9, of the United States Constitution. That petitioner is capable and ready and willing to present evidence to support the allegations in this petition. That petitioner has secured from the Clerk of the Alaska District Court a true and complete transcript of all proceedings in his case, and petitioner has secured from the official court reporter of the Alaska District Court a true and complete transcript of the record as it transpired, and petitioner is capable and ready and willing to offer these in evidence in further support of the allegations of this petition, and petitioner will file these with the Clerk of this Court, as exhibits, at the same time he files this petition.

XXIV.

That the futility of petitioner's efforts to obtain justice from the Alaska District Court, or relief under section 2255 of Title 28 U.S.C.A. and under Rule 32d F.R.C. are, to some degree, illustrated by the contents of exhibit "A" hereto attached and incorporated herein by this reference the same as though it were fully set forth in verbatim. That contained in exhibit "A" are the transcripts of interviews of Carl Tokunage and Donald Apa, the two most important government witnesses, which interviews contain all material matters to which they could testify in petitioner's case; exhibit "A" also contains a copy of petitioner's motion under section 2255, petitioner's motion for special setting of hearing, petitioner's affidavit in support of his motion under section 2255, petitioner's father's affidavit, and other matters of an important nature to petitioner's case.

Wherefore, petitioner prays that this Court issue an order directing the respondents to show cause, at a time and place certain, why the relief prayed for in this petition should not be granted, and that upon respondent's complying with said order and showing cause as directed, that this Court grant petitioner a speedy hearing upon the issues thereby presented and that petitioner be allowed to be present in person at said hearing and be allowed to introduce evidence on his behalf, and that this Court at the close of said hearing unconditionally release petitioner from the unlawful and illegal

confinement under which he is now being held a prisoner.

J. LAEL SIMMONS,
KENNETH DAVIS, and
WM. H. SIMMONS,
Attorneys for Petitioner.

State of Washington,
County of Skagit—ss.

Kenneth Glen Madsen, being first duly sworn on oath deposes and says:

That he is the Petitioner in the above-entitled cause; that he has read the within and foregoing Petition for Writ of Habeas Corpus, knows the contents thereof and believes the same to be true.

/s/ KENNETH GLEN MADSEN.

Subscribed and Sworn to before me this 13th day of April, 1955.

[Seal] /s/ WM. H. SIMMONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT "A"

Interview With Carl Tokunage, U. S. Coast Guard

12/1/54.

Q. How old are you? A. 20.

Q. How old were you at the time of the shooting?

A. 20.

Q. Where are you from? A. Honolulu.

Q. How long have you been in the service?

A. A year and a half.

Q. How long have you been here?

A. About 4 months.

Q. Did you know any of the other fellows before you came to Alaska? A. No.

Q. You met them all up here in the service?

A. Yes.

Q. Do you recall who purchased the whiskey you fellows had before you went out to Ward's Lake?

A. Mike, Don and Aria bought it.

Q. (D.A.): Who went and got it?

A. Apa bought one and Raymond and Mike went and bought the other. All different and separate times.

Q. Do you remember when Madsen came out to Ward's Cove turnaround?

A. It was about 1:00 or 12:00.

Q. Do you remember how much whiskey was left then? A. No.

Q. Did you talk to Madsen?

A. I don't remember. I don't recognize any of them.

Q. Did you strike any of them?

A. I hit two boys but I don't know which ones they were.

Q. Do you know why you hit them?

A. I don't remember what I hit them for. I hit them in the stomach.

Q. Did you actually level off at them or push them?

A. It was just a push with my left hand. I am right handed.

Q. (D.A.): Could you have hit just one boy?

A. I don't know.

Q. (CLC.): What was the size of the boy you hit, was he smaller or bigger?

A. The boy I hit was bigger.

Q. (D.A.): Blond? A. I don't know.

Q. (D.A.): Are you sure you hit two?

A. Yes, quite sure.

Q. (CLC.): Did you get in an argument?

A. We were arguing a little bit.

Q. Do you recall over what? A. No.

Q. Did you patch the quarrel up after you hit them?

A. I don't remember, but the boys told me I apologized.

Q. Were you pretty drunk?

A. Yes, I was feeling pretty good.

Q. Do you usually take a punch at somebody when you get to feeling pretty good? A. No.

Q. Have you done it before? A. No.

Q. The first time? A. Yes.

Q. Do you know how to drive, Carl?

A. Yes.

Q. As you recall, your condition, do you think you were too drunk to drive? A. Yes.

Q. As I recall, after Madsen left, everybody but Vera and Ray got in the car and left to go get another bottle. Is that what you recall?

A. I don't know.

Q. Then the car had motor trouble going up to the Pastime and came up Ward's Lake road and it stopped and wouldn't go any farther. Then Mike, Vera and Dick left. They left you, Billy, Ray and Don in the car. Do you remember?

A. No answer.

Q. What do you remember?

A. We stalled and we started the car and it wouldn't start and I remember Billy saying he was going out.

Q. (D.A.): Where did it stall? Was it near where Ray was killed? A. Yes.

Q. (D.A.): Who was behind the wheel?

A. I was.

Q. (CLC.): Were you driving?

A. No. We all tried to start the car and when they left I just stayed there asleep.

Q. After the car stalled and after the boys left did you get in the car and get behind the wheel?

A. No, I didn't drive.

Q. Do you recall how the car got in the ditch?

A. No.

Q. Between the time that Mike, Vera and Dick left the car and the time that Madsen apparently returned and shot Ray, what do you remember?

A. I remember some kind of noise outside and I

started to get up and saw somebody coming toward me and that is all I remember.

Q. Did you see anything about him?

A. I saw the shape of the fellow coming toward me.

Q. (D.A.): Did you hear anything?

A. Sound of noises.

Q. (D.A.): Did you hear a shot?

A. I heard something like a shot.

Note—I do not know who was asking all these questions here, CLC and the D.A. were asking them. The majority were asked by the D.A.

Q. (D.A.): Did you feel blows? A. Yes.

Q. (D.A.): When did you hear shots in proximity to the blows.

A. I heard the shot, I think, before he hit me. Then I got hit after the shot. But I am not sure whether it was a shot or not. It could have been a backfire or a door slamming but it sounded really loud. I heard a shot or the noise first before I got hit.

Q. (CLC.): After the three left did you talk to any of the fellows in the car?

A. I don't remember. I must have just slept. If I talked I don't remember.

Q. (CLC.): Do you remember if you got out of the car after it stalled and got back in?

A. I don't remember if I did.

Q. (CLC.): Think back when is the last time that you can remember much of anything?

A. I remember going out and everything, and some parts.

Q. Do you remember much of what happened after you left Ward's Lake to go get another bottle?

A. I don't think we were after another bottle.

Q. Do you remember Billy trying to get you out of the car some time before you were hit?

Q. I think I got out of the car by myself. I was sitting in the car and I heard someone coming. I guess I passed out.

Q. Before you were hit, do you recall whether or not Billy tried to get you to leave the car?

A. No, I am not sure.

Q. Do you recall whether or not Ray got sick before any shot? A. No, I didn't hear it.

Q. Do you recall incident of Billy and Don leaving the car?

A. No. I was feeling kind of sleepy and don't remember much. I heard talking, that's all.

Q. Were you in uniform? A. Yes.

Q. Do you recall before you were hit whether or not anybody drove up and stopped and looked around your car and left again?

A. I don't know.

Q. Do you recall the whereabouts in the car before you woke up? A. I was in the front seat.

Q. Can you sit here right now and recall that you were sitting in the front seat or when you came to you were in the front seat?

A. I was in the front seat.

Q. Can you think back and remember sitting there?

A. Yes. All I remember is when I was when he was hitting me, I was behind the wheel.

Q. Did you drive the car at all?

A. No. I was just sitting there.

Q. (D.A.): He wasn't so sure he heard the shot. Last time you gave the impression you weren't sure when shot was fired. How did you remember?

A. I think I heard some kind of a hard noise. I know I heard that.

Q. (D.A.): Could it have been the car stopping or could it have been the slam of a door?

A. Yes.

Q. (D.A.): After he hit you could it have been? Not certain of noise before or after you were hit?

A. I heard what sounded like a shot or a loud noise before I got hit.

Q. (CLC.): Last time Henry talked to you you weren't sure whether noise before or after you got hit?

A. The only time I heard noise was before I got hit.

Interview With Donald Apa, U. S. Coast Guard

12/1/54.

Q. How old are you? A. 21.

Q. How old were you at the time of the shooting? A. 21.

Q. Where are you from? A. Honolulu.

Q. How long have you been here?

A. Six months.

Q. How long in the service?

A. 21 months.

Q. Directing your attention to the gathering at Ward's Lake turnaround when, as I understand it,

you and your group were there and Madsen and his group came and left—do you remember anything about the whiskey bottle?

A. I know we had a few drinks from it and it disappeared when they came. We opened it just before they got there or while they were there.

Q. Do you recall any incident involving one of your group and Madsen?

A. When that happened I was on the opposite side of the car and I thought they were arguing. I found out one of the boys hit him, but I didn't see it. We went over and apologized.

Q. Were you in uniform that night?

A. No, I was out of uniform.

Q. After Madsen left and you fellows got in your car and left also, where were you going?

A. At that time we didn't know it was Ivans, but headed up there to try to get another bottle.

Q. Do you recall driving down the old road from Ward's Lake? A. Yes.

Q. What was Madsen doing?

A. As we came out, somebody said they saw him there and by the time we got close they started to back out.

Q. Do you recall whether your car made any contact with theirs? A. No.

Q. After you and Carl and Raymond and Billy remained in the car and Vera and Mike and Dick left, what took place?

A. In the car nothing happened. We started to talk because Raymond was not feeling good and Billy and I were up. I was in the back seat on the

right-hand side and Raymond was either lying down—I am not sure what he was doing. I think he was lying down.

Q. When you left the car what was he doing?

A. He was heaving outside the car on the left-hand side.

Q. Did you attempt to take him with you?

A. Yes. He said he didn't want to go, so Billy and I left.

Q. Could he have gotten up and walked out?

A. That I don't know.

Q. As you recall, he was awake and in the process of getting sick when you left the car?

A. He was just heaving when I left.

Q. Did you leave ahead of Billy?

A. I think we walked up together. I am not so sure.

Q. Do you recall whether you had to wait outside of the car or whether he was already out when you got there?

A. I don't remember.

Q. Do you remember when Madsen drove up the first time?

A. He just drove up and I didn't see anybody get out of the car. Billy said the boy had a gun.

Q. Did you look?

A. No, I didn't see anything. I didn't look. I didn't move and just laid down on the floorboard on the back seat.

Q. What was Raymond doing?

A. I think he was sitting down at that time. I went down but he didn't go down with me.

Q. How did you know when it was time to get up?
A. We heard the car leave.

Q. Did you try to get Carl to leave?

A. Billy tried but he didn't want to go.

Q. Did Carl say why he didn't want to go?

A. I don't remember.

Q. Was he talking?

A. I think so. I am not sure.

Q. Do you recall whether he was asleep or unconscious when you left?
A. I don't know.

Q. Did you have any conversation in the car with Carl from the time Vera and them left and the time Madsen came up?

A. I think I recall talking with him at the same time Billy and I talked. Raymond was not in the conversation too much.

Q. When you left the car after Madsen came and had gone on, why were you going up to the house?

A. You mean the first time?

Q. (CLC.): Yes.
A. To call a cab.

Q. Did you go back to the car at all before Madsen returned?
A. No.

Q. You got back after he had been and gone?

A. Yes.

Q. (D.A.): We want you to tell as much as we know about this to Mr. Cloudy. Did you come back down the driveway from the house? Did you see a car coming down the road?

A. We saw the lights of a car.

Q. (D.A.): What happened there?

A. Billy said it was them and we went into the bushes and hid there.

Q. CLC.): How far from the road?

A. From where the car was and the house, it was about half way.

Q. Could you see your car from there?

A. Not that I remember. The last thing I saw was the lights of the car. I heard one shot.

Q. Did you hear the car stop? Or a squeal of brakes or rubber. Hear any doors slam?

A. I don't remember.

Q. After you heard the shot, what did you do?

A. Waited until they left and then came out.

Q. What kind of shape was Carl in as far as drinking?

A. I think he had a few drinks and was not feeling too good.

Q. Well, would you say he was drunk? In any shape to drive? Would you have trusted him behind the wheel of a car or rather drive yourself?

A. I don't know about that. I know Carl wanted to drive so I said OK. I knew the car wouldn't go.

Q. Do you think he had too much to drink as far as driving the car to town?

A. Yes.

Q. How long did you know Raymond?

A. Almost all my life.

Q. What kind of a kid was he?

A. He was a clean cut kid before he came up here. He had a few drinks at home and when I met him up here I noticed he drank a lot more.

Q. What was he like when drinking?

A. He like to have a good time.

Q. Any scrapes while drinking?

A. All the time I knew him up here he never got into any trouble.

Q. Lots of partying up here?

A. I don't know. I just came up in June. He would have been here a year in August.

Q. When you left the car was Raymond pretty drunk or was he just sick, or both?

A. I think he was both.

Q. Had you been out drinking with him before?

A. Yes.

Q. Did he tend to get pretty drunk?

A. When we went out to drink, we just bought one bottle. I never had to help him up or down or anything like that.

Q. If he had wanted to drive the car out of there——

A. I would let him drive. I trusted him. He was my friend.

Q. As far as his condition at that time——

A. I wouldn't have let him drive at that time.

Q. (D.A.): Had you had much to drink? What was your condition?

A. I was feeling good but I wasn't that drunk.

Q. (CLC.): Could you see all right. Were things blurry?

A. I could see all right and I think I could walk all right.

In the U. S. District Court for the District of
Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

MOTION TO WITHDRAW PLEA OF GUILTY
UNDER RULE 32 (D), FEDERAL RULES
OF CRIMINAL PROCEDURE, AND TO
SET ASIDE THE JUDGMENT THERE-
UNDER, AND FOR RELIEF UNDER SEC-
TION 2255, TITLE 28, U.S.C.A.

Comes Now, Kenneth Glen Madsen, the minor defendant in the above-entitled cause, through his counsel, and respectfully moves this Court for an order permitting the said minor defendant to withdraw the plea of guilty heretofore made, and to set aside the judgment thereunder pursuant to Rule 32 (D), Federal Rules of Criminal Procedure, and for such relief as may be available to this defendant under Section 2255, Title 28, USCA, upon the following grounds:

I.

The defendant has been subjected to manifest injustice and to a denial of due process of law in that the plea of guilty was made by this defendant in complete and sheer ignorance of the effect of his

act, and because of circumstances beyond the control of this minor defendant; also, the plea of guilty was induced by acts, statements, and by such concealment of facts from this Court and defendant as to constitute misconduct on the part of Government counsel. Defendant was denied the right and aid of counsel of his own choosing, which he was able to provide. Such right is endowed to all persons by the Constitution of the United States. At no time in these proceedings, from the time of the summary ejection of the counsel of his choice, Mr. Simmons, ex parte and without a hearing or just cause, up until defendant was on the way to El Reno, Oklahoma, did this defendant have the guiding hand of counsel of his own choosing at any step in the proceedings against him. Not only was this defendant denied the right to employ and retain counsel of his own choosing to appear for him, and to guide him in the proceedings, but this defendant was also denied the right to consult with counsel of his own choosing. The court-appointed lawyers were ordered not to consult with defendant's own counsel, under pain of contempt, all of which is in violation of the law and in conflict with the Federal judicial scheme, as made and provided by the law and the Constitution of the United States and contrary to the American principle of fairness in all things.

II.

The defendant attaches to this Motion the affidavit of himself and the affidavit of his father, Floyd Madsen, in support of this Motion and makes the

same a part hereof, by reference and incorporation, as if fully set forth herein.

III.

Defendant attaches hereto, also, Exhibits "A," "B," "C," "D," "E," "F" and "G," and makes the same a part hereof as if set forth fully herein, by incorporation and reference.

IV.

The United States Attorney, Mr. Munson, stated in Exhibit "A," "the record will show that Kenneth Glen Madsen was represented by two attorneys who had been connected with the case since its inception." This statement the defendant asserts is untrue; otherwise, why should this Court have appointed counsel under the guise of *forma pauperis* for this minor defendant upon the ejection, without just cause, of Mr. Simmons? There was no reason, if this statement were true, for counsel to be appointed, or of the legal fiction of counsel being appointed under *forma pauperis* being indulged in. Defendant refers to Exhibit "B," which is a letter from Mr. Cloudy of the firm of Ziegler, Ziegler & Cloudy to Mr. Kenneth Davis, dated December 17, 1954, which clearly demonstrates that their appointment as counsel for the defendant at this stage of the proceeding, the day of the Trial, was not accompanied by any intelligent or competent waiver of chosen counsel by this defendant, who at the time of the commission of this alleged crime was

but 16 years of age, not educated or acquainted in the least degree with court proceedings and legal consequences.

V.

This Court was unfortunately misadvised and misled by the United States Attorney as to the activities of Mr. Simmons, the counsel of defendant's own choosing, who had spent approximately three months in the preparation of defendant's defense. Defendant denies today, and denied then, that he is guilty of murder in any degree or of manslaughter, and asserts now and would have asserted then, if he had had counsel of his own choosing and the right to consult with counsel of his own choosing, that he has a defense which would in all probability have resulted in his acquittal. Newly discovered evidence discloses that the United States had no witness to dispute the defense of this defendant. The Coast Guardsman, Carl Tokunage, asserted in an interview with the United States Attorney and Mr. Cloudy that he was not certain whether it was a shot he heard or the noise made by an automobile while he was being struck by this defendant in their fight. At the best, the Government's only witness who was in the car with the deceased, to wit, Carl Tokunage, could not have testified beyond a reasonable doubt that this unfortunate affair was anything but an accident; this interview is attached hereto and made a part hereof as Exhibit "C." Mr. Simmons, defendant's counsel, who had prepared his case and was prepared to bring out a competent defense in behalf of the de-

fendant, was, as aforesaid, summarily and wrongfully ejected from this case on the morning of the trial. This happened, defendant asserts, because this Court was misadvised and misled by the United States Attorney. The record shows that on the 26th day of November, 1954, that Mr. Camerot, assistant to the United States Attorney, advised this Court when Mr. Simmons was not present that he had given the City Police permission for Mr. Simmons to inspect the automobile involved on Thanksgiving Day, the day before the trial was to start, when Mr. Simmons called at the Police Station to see the car; the City Police, on the other hand, had deliberately concealed this information and permission from Mr. Simmons and told him that he could not see the automobile under orders from the United States Attorney; this was an impertinent and insolent denial of due process, and Mr. Simmons, being zealous in this defendant's behalf, in his considered judgment, facing a murder trial starting within 15 hours from the time of this incident, went upon the City property to examine the car anyway. This obviously was not a trespass since Mr. Camerot, the Assistant United States Attorney, admitted to this Court that he had given Mr. Simmons permission to see the car, but the Police Department deliberately concealed this information from Mr. Simmons and from this Court; however, regardless of the right or wrong of the incident, the defendant, of the age of 16 years and with but an eighth grade education and without knowledge of the law and court proceedings, was caught within the vortex of this col-

lateral incident and was made the real victim thereof. The defendant, because of his age, education and, using a phrase from the U. S. Attorney's letter to Mr. Davis, his "dismal background," was incapable of determining for himself, without the guiding hand of counsel in these proceedings, what was good or bad for him to do. The defendant was unfamiliar with the rules of evidence and court proceedings, and being abruptly left without the aid of counsel on the morning of his trial for first degree murder, the defendant lacked the skill and knowledge to adequately decide for himself what his best interest would be under the circumstances. When this Court requested and insisted that this defendant accept and take the oath of a pauper, and thereby create a legal fiction whereby counsel not of defendant's own choosing could be appointed for him in spite of his father's assertion in open court at the time that if given time he would employ other counsel of his own choosing, the Court thereby coerced and intimidated this minor defendant and denied him due process of law.

VI.

The record, supported by the affidavits of this defendant and of his father, attached hereto and made a part hereof, and the assertions and letters of Ziegler, Ziegler & Cloudy, the court-appointed counsel, clearly demonstrates their own admitted incapacity and inadequacy to handle this defendant's case; as they stated, they never had defended

a case of first degree murder and felt unequal to the task. Furthermore, this Court did not allow them time, one week only, to prepare a defense for defendant. Under all the circumstances, and considering that defendant was confined to jail and charged with a capital offense and the appointed attorneys were young and inexperienced, the time allowed to them to prepare the defense was too short. Especially when the Court forbade them to consult with Mr. Simmons.

VII.

This unfortunate accident, for which this defendant was charged with murder, occurred on August 6, 1954; this defendant was at that time 16 years of age; this defendant's mother died a few days later as a result of the shock incident thereto; the defendant's mind was in a state of quandary, confusion and bewilderment. At the present time this defendant is but 17 years of age, and attached hereto is a photograph taken of this defendant in Seattle in the King County Jail on December 28, 1954, while in custody of the United States Marshal, and made a part of this Motion as Exhibit "F."

VIII.

The court-appointed counsel were incapable of handling the defense of this case, according to their statements to this defendant, to this defendant's father, and to others. This defendant has been the victim of circumstances beyond his own control and a manifest injustice has occurred in violation of the

law. Defendant's plea of guilty, improvidently made without intelligent and competent advice by counsel of defendant's own choosing, should be set aside pursuant to Rule 32 (D) of the Federal Rules of Criminal Procedure.

IX.

According to evidence now made available for the first time to this defendant by Mr. Cloudy in his letter to Mr. Davis of December 17, 1954, this was the first time that defendant knew that the District Attorney had no witnesses to dispute the evidence of this defendant except the witness, Carl Tokunage, who had stated that he did not know the difference between a shot and the noise of an automobile; this was a concealment of a material fact, in violation of the United States Attorney's oath of office; the defendant asserts that he had no intent to kill anybody in this unfortunate accident, for this defendant never knew that the deceased was in the back seat of the automobile at the time; the United States Attorney had no one to testify that this defendant knew that the unfortunate boy who was accidentally killed was in the back seat of the automobile and no intent to kill could be proven or inferred. This defendant has been deprived of the use of this evidence and his other rights, as shown by the letter of Mr. Cloudy, as aforesaid. Mr. Cloudy did not file a motion and brief to attack the indictment, as set forth in Exhibit "B," simply because "they might have indicted this defendant over again."

X.

There is no evidence showing this defendant could have been convicted of murder in any degree or even manslaughter; in fact, the evidence not heretofore available to this defendant, because of the inadequacy of counsel, shows conclusively that this defendant would not have been convicted at all had he been given his legal rights to have adequate counsel and intelligent guidance at all steps in the proceedings against this defendant. The court-appointed counsel's admission of his inadequacy, in that he thought the indictment was faulty but failed to attack it, should not be imputed to this defendant because of defendant's ignorance, defendant's age, and the defendant's incapacity for determining for himself whether the indictment was good or bad.

XI.

This defendant is now in custody under a sentence of this Court which was imposed in violation of the Constitutional rights of this defendant and in violation of the laws of the United States; and this Court was without jurisdiction to impose such a sentence because of noncompliance with Sec. 51-3-3 and 51-3-9 of Alaska Compiled Laws Annotated which read as follows:

“Sec. 51-3-3. Jurisdiction. Jurisdiction in cases of children under 18 years of age shall be vested in the Justice Court, which shall have exclusive original jurisdiction in proceedings concerning any child residing in this Territory who (1) has violated any law of the United States or the

Territory or any ordinance or regulation of a subdivision of the Territory; (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; (3) is habitually truant from school or home, or habitually so deports himself as to injure or endanger the morals or health of himself or others; (4) is abandoned by his parent, guardian or custodian; (5) lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian; (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others; (7) is mentally deficient or in need of special care or training provided his parent or guardian consents in writing that such child comes within the provisions of this Act.

“The Justice Court shall also have exclusive jurisdiction in any controversy arising over the custody of a child, and to appoint a guardian of the person and property of any child within its jurisdiction.

“Provided, that such jurisdiction provision shall not be applicable in divorce or separate maintenance cases arising in the District Court, but in such cases the District Judge may, if he deems it best for the welfare of a child involved, order the child turned over to the custody of the Welfare Department. In such event the Wel-

fare Department shall receive such support money as is ordered to be paid by the court and use same to carry out suitable arrangements for the child.”

“Sec. 51-3-9. Waiver of jurisdiction. If a child is charged with an offense which, if committed by an adult, would constitute a felony, the court after full investigation may waive the jurisdiction vested in it by this Act, and order such child held to await action by the grand jury; otherwise, the court shall proceed as herein provided.”

and such sentence should now be vacated and set aside as a manifest injustice and relief allowed defendant under Rule 32 (D) Federal Rules of Criminal Procedure, and under Section 2255, Title 28, USCA.

Wherefore, this defendant respectfully requests this Court to set a date for hearing on this Motion, on a day certain, with the right given to this defendant to call witnesses to give oral testimony in his behalf in support of this Motion; and, defendant respectfully prays this Court to set aside, as aforesaid, and to vacate and to hold for naught the sentence and judgment imposed upon the plea of guilty heretofore made and to allow a withdrawal of such plea of guilty, and grant such other relief as the Court may deem just in the premises.

/s/ KENNETH DAVIS,
Attorney for Defendant.

In the U. S. District Court for the District of
Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

MOTION FOR SPECIAL SETTING OF HEAR-
ING ON MOTION TO SET ASIDE PLEA
OF GUILTY UNDER RULE 32 (D), FED-
ERAL RULES OF CRIMINAL PROCE-
DURE

Comes Now the defendant, through his counsel, and respectfully requests this Court to set an immediate date, upon ten days' notice to all counsel, for the hearing on the motion to set aside the plea of guilty under Rule 32 (D), Federal Rules of Criminal Procedure, which Motion was airmailed to this Court and to all counsel on the 11th day of January, 1955, postage prepaid. This defendant, in addition, moves this Court for an order setting this hearing in either Juneau, Anchorage or Ketchikan, whichever place is to the greatest convenience of the Court, in order that the long-established policy of giving criminal cases precedence over other matters may be adhered to, for defendant is now in Seattle,

Washington, in the King County Jail, in custody of the United States Marshal, and his rights should be determined at once.

KENNETH DAVIS,
Attorney for Defendant.

(Copy)

In the U. S. District Court for the District of
Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH GLEN MADSEN,
Defendant.

AFFIDAVIT OF KENNETH GLEN MADSEN
IN SUPPORT OF A MOTION TO WITH-
DRAW A PLEA OF GUILTY AND TO SET
ASIDE THE JUDGMENT UNDER RULE
32 (D), FEDERAL RULES CRIMINAL
PROCEDURE; AND FOR RELIEF UN-
DER SECTION 2255, TITLE 28, USCA

State of Washington,
County of King—ss.

Kenneth Glen Madsen, being first duly sworn, on
his oath states as follows:

I am the defendant above named and was 16 years
of age at the time I was charged with murder in

the first degree in the above-entitled cause, and I have only had an eighth grade education.

This charge arose out of an unfortunate accident, for which I am terribly sorry, which occurred August 6, 1954. I was a resident of Ketchikan, Territory of Alaska, and lived with my mother, my father, and my 13-year-old brother before the occurrence of the accident which resulted in my being charged with murder. My mother was not well at the time and the shock of my being charged with murder was too much for mother. She died while I was in the jail. She had come to see me at the City Jail but the police refused to let either her or my father see me before I was charged with murder. This refusal was at the instructions, I believe, of the United States Attorney. She dropped dead at home a few days later from the shock. The impact of this unfortunate accident and my mother's death upon my mind left me in a quandary and in a state of confusion from which I wonder if I will ever recover. I had never been in any trouble before except in minor traffic violations. While I was in the Ketchikan City Jail and my folks did not come to see me, I worried a great deal because we have always been a very close family. I know that the Police Department kept my family from seeing me because they told me so. After my mother's death, I did get to see my father on visiting days for a few minutes but always in the presence of the jailor, and I could not confer or talk freely with my father in any degree whatsoever. I became so depressed during this

period that my father became concerned for fear I might lose my mental faculties. The attorney he went to see in Ketchikan did not want my case. He had never defended a person charged with murder and felt that because of the seriousness of the charge and because I was only 16 years old my father should get an experienced trial lawyer from outside the Territory to defend me. This he did. On September 3rd, 1954, Mr. J. Lael Simmons of Seattle, Washington, who had been employed by my father, came to see me. Mr. Simmons talked to me at length and encouraged me to believe that I would have a fair and impartial trial and would not be "railroaded" as some of my fellow prisoners had told me. The first thing Mr. Simmons tried to do was to get me out on bail. My bail had been fixed at \$20,000. This effort to be released on bail was defeated because the Commissioner, Mr. Lien, revoked the bail at the request of the District Attorney. The Commissioner is a Norwegian contractor with no legal education or experience and despite all efforts made by Mr. Simmons in my behalf, including a trip to Juneau to see the District Attorney, there was no reinstatement of bail. This turn of events led me to believe that perhaps I might be railroaded and hanged for a purported crime that was in fact an accident. I was aware of the fact that Mrs. Wells, who was charged in Anchorage with killing her husband, had been released on \$10,000 bail and of course I wondered why my bail was twice as much when fixed and why it was later revoked entirely. However, I had lots of confidence in Mr. Simmons

and felt that he could get me a fair trial and that once I could tell the jury and the people of Ketchikan how the fatal shooting took place I would be freed. So I lived in hope of getting a chance to explain what had happened in open court before the jury and my friends.

My hopes of a fair hearing or trial were shattered when I was advised by Mr. Simmons that he had been excluded from the case. I had no chance to discuss with him any plans for the future conduct of my case but was summarily brought before the Judge and ordered to sign a "pauper's affidavit." I didn't know what I was signing. I had no chance to read it. I was afraid of the Judge. Everybody stared at me. I felt uneasy and beat. I suppose I would have done anything I was told to do at that time. I realize now that it was a great mistake. If only I could have talked to Mr. Simmons for a minute I would never have signed the paper.

The lawyers appointed by the Judge had almost begged the Judge not to become involved in the case without Mr. Simmons to help them, but the Judge rode roughshod over everybody including the lawyers. They all seemed to be afraid of him. My father asked the Judge for time to engage other counsel of our own choice, but the Judge brushed him aside as if he were so much trash.

Soon after the Court-appointed lawyers took over they began to prepare my defense, but I understood they were to get no pay for their work and naturally

I didn't expect much of a defense. It became apparent to me that I was being "railroaded" when one of these Court-appointed lawyers kept telling me what damaging evidence the Government had and what a weak defense I had. He also told me that the District Attorney had changed his mind and was going to ask for the death penalty in my case. I became so upset and worried as a result of the turn of events in my case that I ceased to care, gave up and was completely distracted. Consequently on being pressed to plead guilty on a promise of leniency and at least a pre-sentence hearing, I consented. This plea was coerced. I did not make it of my own accord. I knew at the time and I know now that such a plea was untrue and therefore wrong. I was surrounded by my enemies at the time. If I could have spoken freely to a single friend or lawyer who had my interests and welfare at heart, I certainly would never have consented to that plea.

I am making this affidavit in the King County Jail at Seattle, Washington. I make this affidavit in order to attempt to correct a manifest injustice which was imposed upon me because of my ignorance and because I did not have the intelligence to realize my rights under the Constitution of the United States. I entered that plea of guilty under a mistaken belief which was induced both by the acts and statements of the Government counsel and the acts and statements of the Court-appointed lawyers who had admitted in open Court that they

had never had any experience in trying a case of my kind. My father had told the Court that he was not broke and would employ other counsel, but the Court abruptly ruled him aside and forced and coerced me to take a pauper's oath when we were not paupers. Under that fiction, the Court appointed lawyers who were not familiar with my case and thereby denied me due process of law. They were unfamiliar with the case, they along with the Government counsel induced and coerced me into making a plea of guilty under the mistaken belief that I would get justice when, in truth and fact, I was being "railroaded" to the penitentiary without a trial and without any intelligent waiver of my rights. I was in a sad state of confusion over the death of my mother, this unfortunate accident, and the abrupt dismissal of Mr. Simmons on the day my case was set for trial. I am not guilty of murder. This was not murder; it was an unfortunate accident. I did not intend to kill anybody. True, I did a wrong thing in drinking and carrying a gun but so did everybody else who was at that party on the highway that night including the unfortunate boy who was killed accidentally. Nobody had the intent to kill anyone. I verily believed these Japanese boys had knives and I took my gun as a protection against possible assault. I make this affidavit also because of the misconduct of the District Attorney who handled my case and who sat in conference with my Court-appointed attorney. This District Attorney kept saying he could ask that I be hung by the neck until I was dead—and he used that phrase,

I quote it, "hung by the neck until I was dead"—it made me so panicky, what with my confusion over the death of my mother and over the death of this unfortunate boy because of this accident and the dismissal of my counsel, I didn't know what to do. I could not at any time confer with my counsel, who had made several trips to Alaska and had investigated the case, or with my father. They forced and coerced me into making this plea of guilty. I am advised also that the Court met my Court-appointed attorney upon the street on the day trial commenced and told him, this counsel of mine who was Court-appointed and not experienced, that he had better make a deal with the District Attorney.

I am also advised that I did not receive my rights as a minor under the Juvenile laws of Alaska where a minor is to be held until after an investigation is made by a justice of the peace and he after such investigation, while he may waive me over to the Federal grand jury, yet he has to make an investigation. He never made any such investigation in my case, nor did he sign any waiver, and if he had made such an investigation, he would have found that the situation of our family was such, what with the death of my mother, the prostration of my father over this unfortunate accident, and the confusion I was in, he very well could have refused to turn me over to the grand jury for indictment. Further I might have had a right to appeal from

any order of waiver. My father and these lawyers who the Court appointed were forbidden by the Judge and afraid to talk to Mr. Simmons after he had been unnecessarily and unfortunately ejected from the case. The Court made no provisions for giving Mr. Simmons a hearing, but threw him out summarily. The Court ordered me not to talk to Mr. Simmons and my father was ordered not to talk to Mr. Simmons, and my Court-appointed lawyers, who admitted they had never tried any such case as mine, told me that I could not use, nor could they use, any of the work that Mr. Simmons had prepared in aid of the defense of my case.

There was never any intent to kill anybody in this unfortunate accident because, in the first place, the accident happened in the course of a fight. I had a gun which was discharged accidentally and killed the Japanese boy in the back seat of the car. I didn't know he was in the car. Obviously—and I repeat this—obviously I could not have had any intent to kill him because I never knew this unfortunate boy was in the car at the time. How could I have an intent to kill him if I didn't know he was there? I only thought that there was one person in the car and that was a person who was striking at me and whom I was defending myself against with the butt end of a pistol. The car was tipped over in such a way on the road in the barrow pit that it was impossible for anyone to see that another person was in that automobile—it was dark (about 2:00 a.m.)—so, therefore, after I have collected my thoughts, it occurs to me that I could not have the

intent to kill anyone in second degree murder or first degree murder. I didn't know such a person was present. I could not, I understand, even be convicted of manslaughter under the facts. I didn't know a person was there. It might have been negligence on my part if I had known he was there, but I didn't know he was there. I have, I submit, been denied my rights in a court of law under the due process clause of our Constitution.

KENNETH GLEN MADSEN.

Subscribed and Sworn to before me this 23rd day of December, 1954.

[Seal] K. G. SMILES,

Notary Public in and for the State of Washington,
Residing at Seattle.

(Copy)

In the U. S. District Court for the District of
Alaska, Division Number One, at Ketchikan

No. 1652-KB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH GLEN MADSEN, a Minor,

Defendant.

AFFIDAVIT OF FLOYD MADSEN, FATHER
OF KENNETH GLEN MADSEN, IN SUP-
PORT OF A MOTION TO WITHDRAW A
PLEA OF GUILTY AND TO SET ASIDE
THE JUDGMENT UNDER RULE 32 (D),
FEDERAL RULES OF CRIMINAL PRO-
CEDURE; AND FOR RELIEF UNDER
SECTION 2255, TITLE 28, USCA

State of Washington,
County of King—ss.

Floyd Madsen, being first duly sworn on oath,
deposes and says: That he is the father of Kenneth
Glen Madsen, the minor defendant in the above-
entitled cause; beginning with the day of the trial
when the trial of my son for murder in the first
degree was supposed to begin, I arrived at the
Courthouse a little behind schedule and while the
Court was taking care of some other matters, a man

in the hallway told me that Mr. J. Lael Simmons, my minor son's attorney, had been ejected from the case and could not defend our case. This was the first indication of any kind that I had had that we had no counsel. I stayed in the hallway outside the Courthouse while Mr. Simmons attempted to be reinstated in my son's case and did everything in his power to get back in the fight and continue as our counsel. When things had settled down and Court was convened, Kenneth, my minor son and defendant, and I were called before the Judge and the Judge asked me if I had counsel and I told him I had engaged Mr. Simmons; the Court informed me that Mr. Simmons could no longer represent my son; I told the Court that I would get another attorney if given a little time; this the Court refused; then I asked permission to speak to Ziegler & Cloudy. The Court had already indicated that Kenneth would have to sign a pauper's oath. I conferred with Mr. Cloudy for a few minutes in the anteroom near the Judge's chambers and was advised that I should go ahead and permit Kenneth to sign a pauper's oath, but to try to get as much time as possible. We returned to the courtroom and acting upon Mr. Cloudy's advice, I made the statement to the Court that I was not broke and that while I was badly stretched, yet I could still raise money to have counsel of my own choosing for my son's defense, and that it was not necessary to take the pauper's oath, but that I couldn't raise the money until the banks opened Monday morning—this was on a Friday morning. The Judge informed

us that the Court didn't have any time to waste on things like that and that the Court would appoint counsel for Kenneth, whereupon the Clerk prepared a pauper's oath and the Court ordered Kenneth to sign that he was without funds and couldn't borrow money, and so forth, and he did sign the pauper's oath. Of course a sixteen- or seventeen-year-old boy had no funds, but I was not broke and if given two days' time, I could have raised money to employ counsel.

The Court was then recessed to convene again on December 6, 1954, at 9:30 in the morning, a delay of only nine days for new counsel to defend my son on a first degree murder charge, upon which Mr. Simmons had been working since August 20, 1954, or three months. The court-appointed counsel were, by the Court, forbidden to use any of Mr. Simmons' work.

I appeared in Court on time on Monday morning, December 6, 1954, and they began the impanelling of the jury. Each side had used ten challenges and the jury, you would say, was half picked when the noon recess came and the jury panel was exhausted. I went home for lunch and when I came back I was met in the hall by Mr. Ziegler who asked me to come on down to the District Attorney's office. I went into the District Attorney's office and while there, Mr. Ziegler and Mr. Cloudy, the court-appointed counsel, were on one side of the room along with the three District Attorneys and they were discussing Mr. Simmons and his ability to handle the case.

Mr. Ziegler made the statement to the District Attorney that Mr. Simmons should never have given us any hope to get the boy freed because there absolutely was not enough evidence to warrant an acquittal and that he would probably get the maximum sentence. Mr. Ziegler and the District Attorney discussed several other cases to be held in the future at Juneau; they discussed the merits, pro and con, of one case and another, civil actions, that is, and whether or not he thought he could win them on certain phases of the law they discussed and I just overheard. About this time Mr. Cloudy disappeared out one door and immediately after Mr. Ziegler and the three District Attorneys instructed us to stay in the room; by us, I mean, Kenneth and I; they put us in one room and they disappeared into the other room for some purpose—I imagine a conference. They placed Kenneth in a chair facing the bloody seat from the car in which the shooting took place. Upon their return they took us into another office wherein they harrangued us some more, both Mr. Ziegler and the three District Attorneys, all telling us what could be done and what couldn't be done, and then when the Marshal showed up—that I guess is what they were waiting for—we were taken to the jury room where we were permitted to talk to Ziegler and Cloudy, with the Marshal outside. Ziegler started the talk and then Mr. Cloudy, then Ziegler left and Cloudy took over. During the course of this conversation in the jury room, Mr. Ziegler told me that he had

talked to Judge Folta during the noon hour on their way down to lunch and that Judge Folta had told him that whatever verdict the jury brought back that the Judge was going to give Kenneth the maximum penalty under the law. In this instance he pointed out that while the District Attorney had said he was not going to ask for the death penalty, it would not be impossible to impose such in case the jury did bring back a verdict of guilty of first degree murder. He also pointed out that if the jury brought back a verdict of second degree murder, that the sentence could be more than 25 years. He also pointed out the fact that they had been promised a pre-sentence hearing, at which time I would be allowed to testify and to have all of Kenneth's friends that we wanted as character witnesses; people that had known him a long time and he pointed out the benefits of a hearing of this kind. This hearing was also agreed to by the District Attorney earlier. Mr. Ziegler also informed me that regardless of what I wanted, what I said, whether I gave my permission or not, that Kenneth could do as he pleased, even though he had just then turned seventeen.

Another thing that I didn't learn until afterwards, after the plea of guilty had been made, was the fact that my court-appointed attorneys had informed Kenneth in the cell prior to the sentence that if the case were appealed, if the decision went against us and the decision was appealed, that the Court of Appeals could impose the death penalty.

Going back to December 6th when the two attorneys—that is, Ziegler and Cloudy—myself and Kenneth were before the Court, it was brought out that one of our star witnesses as to Kenneth's character lived in Seattle. It was made as a direct question to the Judge if he would hear this man if he should be a little late. We asked the Judge if Pete Sanstol, Civic Center Director of Ketchikan for eight years, would be allowed to be heard if he were a little bit late, and the Judge did agree on that day to hold Court open and withhold sentence until Pete could be heard in case he got to Ketchikan too late to be heard at the morning session. Then the next day, when Court was called into session, no one was allowed to testify as to the character of Kenneth. The attorneys for Kenneth were shut up at every chance; they had a chance to say very little. Mr. Cloudy did try to make a good talk before the Court but every time that he brought out anything that was advantageous to us, to Kenneth's case, he was cut off, either by the District Attorney or the Judge. The Judge was not interested in any way—and he so stated—in Kenneth's character, in his abilities or his truthworthiness. At one time during the pre-sentence hearing so called, the Judge made the statement that he did not care what kind of a boy Kenneth was when he was sober; what he wanted to know was what kind of a boy was he when he was drunk. Mr. Cloudy said that we also had witnesses that could testify to that. The Judge then stated that he didn't care about that either.

I would like to state that this plea of guilty was made against my better judgment and over my protest all the way through. The fact that Mr. Ziegler had told me that whatever I said, however I felt about it, didn't matter, and that Kenneth could do as he pleased, led me to think that perhaps Kenneth would go ahead and plead guilty no matter what I said; I kept telling him that it was wrong. Another thing that led Kenneth to plead guilty was the fact that we had been to such an expense that he figured that he would take his medicine for his mistake and leave me free to pursue my life and not spend any more money on the case. I did not know this at the time. Remember, this boy's mother had died and the boy did not want to burden me further, although it was no burden but a cause for one that I love. If one would look at Kenneth's picture attached hereto and made a part hereof, you can see how youthful and immature he is even now. I'd like to repeat that Kenneth is not a vicious boy, he is not a mean boy, he has worked with me on a fishing boat since he was thirteen years old. He is a gentleman when with older people and has a very good reputation among his friends and the people who know him. He was coerced into pleading guilty by a systematic scheme engineered by the Judge in co-operation with the District Attorney and accepted by our court-appointed lawyers.

I only regret that I was unable to defend myself and Kenneth against the unwarranted attack made

upon us by Mr. Camerot who had no basis whatever in fact for the statements he made in court against us.

FLOYD H. MADSEN.

Subscribed and Sworn to before me this 28th day of December, 1954.

[Seal] J. LAEL SIMMONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States District Court, First Division, Territory of Alaska, Judge's Chambers, Juneau

George W. Folta, Judge.

December 22, 1954.

Senator William Langer,
Senate Office Building,
Washington, D. C.

Dear Senator Langer:

Your radiogram of the 17th recommending Mr. Kenneth Davis for admission to this Bar for the purpose of participating in a proceeding which he intends to bring was received several days ago, and will make it unnecessary for me to have some local person vouch for him.

With best wishes for the holidays, I am,

Sincerely yours,

/s/ GEORGE W. FOLTA,
District Judge.

(Copy)

December 28, 1954.

United States District Court,
Office of the Clerk,
Territory of Alaska,
First Division,
Ketchikan, Alaska.

Attention: J. W. Leivers, Clerk.

In re: U. S. vs. Kenneth Glen Madsen, a
minor; Criminal Action File No.
1652-KB

Dear Mr. Leivers:

1. Will you kindly send me by return mail a copy of any form or forms for seeking admission to the U. S. District Court for Alaska for the purpose of arguing a motion to set aside the plea of guilty in the above-entitled cause under Rule 32 (D), Federal Rules of Criminal Procedure, and for relief of the above minor under Section 2255 USCA.

2. I was told about a rule promulgated by Judge Folta on December 20th, 1954, relating to outside counsel. I always comply with any rule of any court I appear in. Therefore, I respectfully request that you send me by return mail a copy of the rules of the United States District Court for Division No. 1.

3. I am awaiting the receipt of an entire transcript of record which I ordered from the court reporter before the filing of the respective motions

setting forth very definitely and with particularity the denial of due process to this minor.

4. I surmise these petitions will be filed within the first or second week of January, depending upon the speed of the court reporter. Would you, therefore, give me an idea of the court schedule and as to whether these petitions would likely to be heard in Juneau or Ketchikan? I would prefer them to be heard in Ketchikan for as I have stated heretofore, I believe it obligatory on the Department of Justice to permit this minor to be a witness in person, together with his father, Floyd Madsen.

5. What is the motion day when the court is setting at Ketchikan?

In conclusion, I would appreciate your immediate attention to the above items and the filing of this letter in the record of the above-entitled cause.

Very truly yours,

KENNETH DAVIS.

KD:ha

Airmail

P. O. Address:

812 Joshua Green Building,
Seattle 1, Washington.

cc: The Hon. Theodore Munson,
United States Attorney,
Juneau, Alaska;

The Hon. George W. Folta,
U. S. District Court,
Juneau, Alaska;

The Hon. Herbert Brownell,
Attorney General of the United States,
Justice Department,
Washington, D. C.;
Clerk of the U. S. District Court,
Juneau, Alaska.

United States Senate
Committee on the Judiciary

December 29, 1954.

Hon. Kenneth Davis, Attorney,
812 Joshua Green Building,
Seattle 1, Washington.

Dear Mr. Davis:

Inasmuch as Senator Langer is presently in North Dakota, we are taking the liberty of sending you the letter he received from Judge George W. Folta, which you may wish to have.

With kind regards and best wishes, I am,

Sincerely,

/s/ IRENE MARTIN EDWARDS,
Assistant to Senator Langer.

IME:dfg

Exhibit A

United States Department of Justice

United States Attorney

First Division, District of Alaska

Juneau

December 31, 1954.

Mr. Kenneth Davis, Attorney,
812 Joshua Green Bldg.,
Seattle 1, Wash.

Dear Sir:

This acknowledges your letter of December 22 and the attached letter addressed to the Hon. George W. Folta.

In your letter you asked whether we would "entertain the idea of consenting to the motion to set aside the plea of guilty" and putting Kenneth Madsen "to trial on the merits." In support of this you state rather categorically that Kenneth Madsen was deprived of due process. I am firmly convinced, however, that he was afforded not only his right to due process but was extended considerable leniency by the District Court when he was permitted to plead to the lesser included offense of Second Degree Murder and also when the Court gave him a sentence of twenty-five years imprisonment instead of life imprisonment. The record will show that Kenneth Madsen was represented by two attorneys who had been connected with the case since its inception.

[In margin: Note—Why appoint counsel forma pauperis then?]

Since you have not yet received a transcript of the record of the case and since it does not appear that you are familiar with the facts of the case I wish to inform you that Madsen killed a twenty-year-old coast guardsman by shooting him in the back of the head while he was asleep. The Grand Jury returned an indictment charging Madsen with Murder in the First Degree. Because of the age of this defendant we recommended to the Court that his offer of a plea to Second Degree Murder be accepted. In sentencing the defendant the Court took into consideration the rather dismal family background of the defendant and his age, and gave him what is undoubtedly a humane sentence.

In view of the foregoing, the answer to your question is "No." We would not entertain the idea of consenting to your motion to set aside the plea of guilty of Murder in the Second Degree.

Very truly yours,

/s/ T. E. MUNSON,

United States Attorney.

(Copy)

Exhibit G

January 4, 1955.

The Hon. Theodore Munson,
U. S. Attorney,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a
minor; Cause No. 1652-KB

Dear Mr. Munson:

I received your letter of December 31, 1954, and have taken the privilege of setting it forth as an Exhibit in the attached Motion to vacate the plea of guilty under Rule 32 (D) of the Federal Rules of Criminal Procedure and for such relief as is possible under Section 2255, Title 28, USCA.

I would appreciate your informing me why it was necessary to appoint counsel under forma pauperis, as was done, if this minor defendant had counsel of his own choosing and selection, and the guiding hand of counsel at every step of the proceedings against him, if these lawyers, Ziegler, Ziegler & Cloudy, had been in the case since its inception?

I am attaching this letter as Exhibit "G" to the Motion to set aside the plea.

I would appreciate at least two weeks' notice of

a hearing date. I so wrote to the Judge as per the enclosed.

Very truly yours,

KENNETH DAVIS.

KD:ha

encl.

Airmail

cc: Hon. George W. Folta,
Juneau, Alaska;

Ziegler, Ziegler & Cloudy,
Ketchikan, Alaska;

Hon. Herbert Brownell,
Attorney General of the U. S.
Washington, D. C.

(Copy)

January 4, 1955.

The Honorable George W. Folta,
U. S. District Court,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a
minor. Cause No. 1652-KB

Dear Judge Folta:

I enclose herewith the original Petition and Affidavits and Exhibits, and the Motion and petition of

Kenneth Glen Madsen to vacate and set aside the plea of guilty heretofore made in this cause on the grounds and for the reasons stated in this petition.

I hereby enclose also the original certificate from the Supreme Court of the State of Washington and from the U. S. Court of Appeals Ninth Circuit certifications that I am in good standing of its courts.

I received from Senator William J. Langer a copy of your letter to him on the 22nd day of December, 1954, stating that I would be permitted to argue this cause on behalf of this defendant without the necessity of local counsel being employed and I appreciate your kindness in such respect.

I wish you would have your Clerk file these originals and notify me of a convenient date for this Court to hear this Motion and in which city, namely, either Ketchikan or Juneau.

I am sending a copy of this letter to Mr. Theodore Munson, U. S. Attorney in Juneau, Alaska, to Ziegler, Ziegler & Cloudy, attorneys in Ketchikan, and to Attorney General Herbert Brownell in Washington, D. C.

It is my considered opinion, in order to make my record to which this defendant is entitled, that I would like to have the oral testimony of Mr. J. Lael Simmons, the oral testimony of this defendant, his father, Floyd Madsen, and Mr. Ziegler and Mr. Cloudy. This matter could be disposed of, I believe, in at least one day but hardly less. I would ap-

preciate at least two weeks' notice being given me of the hearing date so that preparations could be made to come to Alaska in sufficient time in advance of the hearing.

I wrote Mr. Leivers, the Clerk of the Court, on December 28th asking him for said information but have received no answer thereto.

Very truly yours,

KENNETH DAVIS.

KD:ha

enclosures

Airmail

cc: Hon. Theodore Munson,
U. S. Attorney,
Juneau, Alaska;

Ziegler, Ziegler & Cloudy,
Attorneys at Law,
P. O. Box 1079,
Ketchikan, Alaska;

Hon. Herbert Brownell,
Attorney General of the U. S.,
Washington, D. C.

(Copy)

January 12, 1955.

Hon. George W. Folta,
U. S. District Court,
Juneau, Alaska.

In re: U. S. v. Kenneth Glen Madsen, a
minor; Cause No. 1652-KB

Dear Judge Folta:

Enclosed is a Motion for a special setting which I am submitting without argument. Copies hereof are being sent to all counsel.

The defendant is in jail in Seattle, suspended midway between "heaven and earth," so to speak, and his rights should be speedily determined.

Does your letter to Senator Langer of the 22nd of December, 1954, permit me to argue this matter, upon the showing I have made, in view of your new Rule II? I was not aware of this Rule and your letter to Senator Langer was dated December 22, 1954, two days after the promulgation of Rule II.

Very truly yours,

KENNETH DAVIS.

KD:ha
encl.
Airmail



January 18, 1955

W. S. Letters, Clerk
United States District Court
Anchorage, Alaska

Re: U. S. vs. Kenneth Glen Hansen, a minor
No. 1452-AM

Dear Mr. Letters:

Thank you for your prompt letter of January 14th where-
in you advised me that Judge Volta states I have misinterpreted
his letter to the Honorable William J. Langer in that Judge Volta
stated he meant that the local lawyer need not "identify" or
"vouch" for me, but that I would still have to comply with Rule 2
promulgated December 20, 1953. As I understand, Rule 2 requires
that a local attorney must (1) make an affidavit that he shares
equal responsibility in all decisions in the matter with the pe-
tioning non-resident counsel, and (2) that a written motion must
be made for my admission.

Please be advised that I always comply with all rules
of court and I ask no exception in this case, and so that all parties
may understand my position, I am sending copies of this letter to
them.

You have on file (1) a statement by the Clerk of the Supreme
Court of Washington in respect to me, (2) a certification by the United
States Court of Appeals respecting my admission there, and (3) a per-
sonal statement complying with Form 2, page 27 of your local rules.
Consequently, I have advised Mr. Hansen of this statement of yours
of January 14th and he will no doubt secure local counsel to make
my motion for admission.

In the event that local counsel cannot be obtained to assist
me in this respect, then I will file an affidavit with your court
setting forth the record, as made by letter, communications, and a
reporter's transcript, and take the position under Sec. 220, Title 20,
U.S. Code, that "the remedy by motion is inadequate or ineffective to
test the legality of his detention." This is obviously the case if
he minor prisoner cannot secure counsel to appear in court for him
if his counsel cannot get into the court.

I suggest for the benefit of counsel that a very careful
reading be given to the case of Chandler v. Regier, 148 U.S. 3.
5 S.Ct. 1 (decided November 8, 1914).

. Writers, Clerk
United States District Court, Juneau, Alaska
Page 2. January 18, 1925

I would appreciate if you would advise me as to the disposition of the motion I submitted, waiving argument and asking for a special setting for this cause. Contrary to the rumors I have been hearing about the feeling toward Seattle lawyers in Alaska, I beg to advise all and sundry that I have never met any lawyers or judges in Alaska who have not treated me in any way but with the utmost courtesy and respect. Also, Seattle lawyers are a first class group of men, just as, I am sure, Alaska lawyers are courteous and learned men. Additionally, this is not a contest among boiler-makers with the use of brawn, but an intellectual contest over the due process denied or allowed to a minor boy. Both sides cannot be right. One side has to lose, but the loser can have access to the appellate courts as a gentleman and a lawyer should do, but in the meantime, I suggest that this matter be disposed of in the interest of economy to the Government and of good judicial administration.

I will endeavor to secure some local lawyer to move by admission pursuant to Rule 2. If that cannot be done expeditiously, then I want this letter to speak as part of the record that "the remedy by motion" (Under rule 22(d) F.R.C.P. and Sec. 2295, Title 28 U.S.C.A.) before the court which imposed the sentence is "inadequate or ineffective."

Very truly yours,

Kenneth Davis

812 Joshua Green Bldg.
Seattle 1, Washington
KDs:b

CC: Mr. Theodore Hanson, U. S. District Attorney
Federal Courthouse Building, Juneau, Alaska

Honorable George W. Polta, U. S. District Judge
Federal Courthouse Building, Juneau, Alaska

Honorable Herbert Brownell
Attorney General of the United States, Washington, D. C.

Honorable William J. Langer
Senate Office Building, Washington, D. C.

United States District Court, First Division, Territory of Alaska, Judge's Chambers, Juneau

George W. Folta, Judge.

At Anchorage.

March 27, 1955.

Mr. Floyd O. Davidson,
Attorney at Law,
Box 1108,
Ketchikan, Alaska.

Dear Mr. Davidson:

I have your further letter of March 21st with reference to the Madsen Case.

In view of the circumstances of this case and my concern that the orders made against Simmons and Davis be not circumvented, I shall require that the motion already filed should be supported by showing, 1) that you are not acting for Simmons or Davis—in other words, that they are not acting through you; 2) that you derive your authority solely from Madsen or his father, and, 3) that you are familiar with the contents of the motion and supporting papers and that you adopt them as your own. In this connection, however, I wish to point out that from my recollection of these papers, which are not accessible to me here, it appeared to me as I glanced over them that there were many statements of an impertinent and contemptuous nature. I mention this so that you will be fully apprised of

their character and will be fully aware of what you are adopting.

Very truly yours,

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 13, 1955.

United States District Court, Western District of
Washington, Northern Division

No. 149

KENNETH GLEN MADSEN,

Petitioner,

vs.

HAROLD H. HINSHAW, the Sheriff of Skagit
County, Washington, and WILLIAM B. PAR-
SONS, the United States Marshal for the
Western District of Washington, Northern
Division, and The Honorable HERBERT
BROWNELL, the Attorney General of the
United States,

Respondents.

DECISION AND ORDER

Petitioner has applied to this court for a writ of habeas corpus. He alleges that he is presently confined in the Skagit County Jail in Mount Vernon, Washington within the territorial jurisdiction of this court by the Sheriff of Skagit County, Wash-

ington and by the United States Marshal for the Western District of Washington and by the Attorney General of the United States. Petitioner further alleges that on August 6, 1954, when he was sixteen years of age he became involved in an occurrence at Ketchikan, Alaska resulting in indictment by a grand jury sitting for the federal district court of Alaska, Division Number One at Ketchikan charging him with the crime of first degree murder. A copy of the indictment is set forth.

He further alleges certain facts which he claims violated his substantive and procedural rights as guaranteed by the United States constitution. Involved are his alleged denial of representation by counsel of his own choosing and the denial of rights guaranteed by Chapter 3 of Title 51 of the Alaska Compiled Laws Annotated (1949) in that as a minor there was no adequate waiver of jurisdiction by the Justice Court at said place. It is alleged that petitioner was denied counsel by virtue of the trial court's arbitrary refusal of permission to petitioner's chosen attorney to participate in his defense on the day the trial was to have begun; that on that day petitioner's father was personally present in court and stated that he could procure other competent counsel for his minor son if given adequate time, that the court refused to grant such time and compelled petitioner to take a pauper's oath, whereupon the court appointed two unwilling attorneys to represent him; that said attorneys were not granted sufficient time in which to prepare his de-

fense; that by reason of all the circumstances petitioner was over-persuaded to make an offer to withdraw his plea of not guilty and to plead guilty to second degree murder; that the proceedings with regard to such change of plea were not proper and that plaintiff has not withdrawn his plea of not guilty.

Petitioner further sets out the judgment and commitment made and entered by the judge on December 7, 1954.

The above embraces the first twenty-one paragraphs of the petition. All of the above claims are stated in much greater detail than are stated herein but I believe that the foregoing is a reasonably accurate, although brief, summary of plaintiff's claims as to the errors of the trial court and of the alleged deprivation of petitioner's constitutional rights.

Paragraph XXII of the petition reads:

“That petitioner has complied with Section 2255 of Title 28 of the United States Code Annotated, in that he has twice sought relief under that section, by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial Court. That Section 2255 has been wholly inadequate and ineffective in petitioner's case. That other matters and circumstances exist which have rendered Section 2255 not only an extreme hardship to petitioner,

but also totally ineffective. In fact Judge Folta has refused to permit petitioner's counsel Davis or Davidson to file his petition to vacate the plea of guilty."

Paragraphs XXIII and XXIV allege that habeas corpus is the only adequate and effective remedy now left to petitioner by which he may correct the manifest injustice of his unlawful and illegal confinement.

There is also filed with the petition certain supporting exhibits. Exhibit "A" includes a motion to withdraw the plea of guilty and to set aside the judgment and for relief under §2255, Title 28 U.S.C. A., with supporting affidavits and data, presumably mailed to Judge Folta, the sentencing court, for filing. It does not appear that such motion was actually filed. The copy of record of the court under certificate of the clerk of the district court for the First Division, Territory of Alaska (Exhibit "B") indicates not. Exhibit "B" is a certified copy of the court records in the Alaska court, which states that it is complete with the exception of the reporter's transcript. Exhibit "C" is a reporter's transcript of the record in the Alaska court duly certified by the reporter. This court also takes judicial notice of the opinion in *In re Davis*, 128 F. Supp. 283 in which Judge Folta denied Kenneth W. Davis, one of the attorneys for petitioner herein, permission to appear to argue motion to vacate judgment and sentence.

Upon the request of counsel for petitioner for issuance of an order to show cause why the petition for habeas corpus should not be granted the court raised the issue of jurisdiction and called upon the United States Attorney to appear in the matter with respect to the issue of jurisdiction. Thereafter briefs by petitioner and the United States Attorney as to the jurisdiction of this court to consider the petition for habeas corpus have been filed and considered.

The sole issue before the court is one of jurisdiction—namely, can this court under §2255 of Title 28 U.S.C.A. entertain the petition for habeas corpus filed herein?

Petitioner contends “Section 2255 has worked an extreme hardship on petitioner and has been wholly ineffective and inadequate for him to test the legality of his detention, although he has earnestly attempted to comply with its terms.” (Petitioner’s brief pp. 16-17).

Petitioner also contends “If a prisoner makes a sufficient showing, by proper allegation, that Section 2255 is or would be inadequate or ineffective, in his particular case, he may then seek relief by habeas corpus. The court, in determining whether the allegations are sufficient, may not go outside the record, and must accept all allegations of fact as being true unless they are clearly repudiated by the record.” (Petitioner’s brief p. 7.)

The court, it may be assumed, is not bound by nor must it accept an allegation “that Section 2255

is or would be inadequate or ineffective" if such allegation is merely a conclusion and not otherwise substantiated by showing or allegation of sufficient facts or circumstances.

The Court of Appeals for the Ninth Circuit has held in *Winhoven v. Swope*, 195 F. 2d 181:

"Section 2255 of 28 U.S.C. provides in its last sentence that if a federal prisoner moves under that section to vacate the sentence under which he is held, in which motion he may have effective and adequate relief, and is denied that relief, he cannot thereafter apply for a writ of habeas corpus. 'An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.' We have so held in *Jones v. Squier*, 9 Cir., 195 F. 2d 179; See *United States v. Hayman*, 342 U.S. 205, 72 S. Ct. 263."

It must be conceded from the petition and accompanying exhibits herein that petitioner has sought relief under Section 2255 and that the sentencing court has neither yielded nor denied relief.

While it cannot be ascertained with certainty from the record before this court why the sentenc-

ing court in Alaska has allegedly denied petitioner a hearing upon his motion under Section 2255 of Title 28 U.S.C. it would appear that it is because of procedural objections raised by the trial court, more particularly that petitioner is appearing directly or indirectly through legal counsel who have not been admitted to the Alaska court.

In any event, however, the logic of the conclusion of Judge Denman in writing for the Court of Appeals in *Winhoven v. Swope*, *supra*, would seem to apply. Therein he states:

“Winhoven states that he sought the identical relief in his Section 2255 motion that he seeks in his application for the writ. It therefore cannot be said his ‘remedy by motion is inadequate or ineffective to test the legality of his detention.’ ”

This court believes that all the matters claimed by petitioner as defects in the proceedings in the Alaska court can be and should be finally adjudicated by the Alaska court or on appeal therefrom and that this court has no jurisdiction of a habeas corpus proceeding under the facts herein.

Section 2255, Title 28 U.S.C.A. provides, in part:

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to im-

pose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. * * *

“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

Section 2255 has been many times construed and passed upon by the various district courts and circuit courts. It was passed upon and upheld in the case of *United States v. Hayman*, 342 U.S. 205.

Petitioner contends that the remedy by §2255 is “inadequate or ineffective” under the facts of this case. It would seem to this court that petitioner construes §2255 as meaning that proceedings thereunder are inadequate and ineffective if the sentencing court to whom the motion for relief is

addressed is guilty of some error in failing to allow such petition to be filed or in failing to allow some particular attorney to appear before such court and present such petition and argue the same. A reading of the section shows that such construction is erroneous. It must appear "that the remedy by motion is inadequate or ineffective," in order to give a district court sitting as this district court is situated jurisdiction to entertain a petition for writ of habeas corpus.

Referring again to *Winhoven v. Swope*, supra, the court stated as to errors of the sentencing court with respect to a motion under §2255:

"All these claimed errors could have been raised by appeal as similar contentions were considered and decided in the appeal in the *Hayman* case. That is to say, §2255 afforded *Winhoven* an adequate and efficient remedy both as to the issues tendered in the motion and as to any error committed in litigating the motion."

In *Sorrentino v. Swope*, 198 F. 2d 789, a somewhat similar contention to that herein was made and Judge Bone, speaking for the court of appeals, said:

"The petition of *Sorrentino* makes plain why he did not rely upon or resort to the provisions of Section 2255. It argued that 'the provisions of Section 2255 * * * are inadequate and ineffective by virtue of the rule of practice pronounced by the Court of Appeals of this

Circuit; also, the patent unlawfulness of the commitment, being void on its face, makes recourse to the writ of habeas corpus the sole and whole remedy available to your petitioner.'

"The contention just above noted is void of merit."

The third circuit in United States ex rel. Leguilou v. Davis, 212 F. 2d 681, cited and followed the ninth circuit in Winhoven v. Swope, *supra*, in a case in some respects analogous to the instant case. In holding that exclusive jurisdiction rested with the sentencing court Judge Hastie, writing for the court, stated:

"The only exception to this rule of supersession which is authorized by the language of Section 2255 occurs when 'the remedy by motion is inadequate or ineffective to test the legality of * * * detention.' But the remedy is not made thus 'inadequate or ineffective' by doubts about its administration in a particular case. Even if a district court should incorrectly dispose of a proper motion under Section 2255, the remedy would be by appeal and not any alternative habeas corpus petition."

If Judge Folta, the sentencing judge, has in any manner failed to accord petitioner any of his rights under §2255 of Title 28 U.S.C. relief must be sought before the court of appeals and not here. This court has no authority to intervene.

It is the decision of the court that this court does not have jurisdiction to entertain the petition and it is ordered that the petition for writ of habeas corpus filed herein be and it is hereby dismissed.

Dated May 6, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 6, 1955.

[Title of District Court and Cause.]

MOTION TO RECONSIDER AND AMENDED
PETITION FOR A WRIT OF HABEAS
CORPUS

To: The District Court of the United States for the
Western District of Washington, Northern
Division

Comes Now Kenneth Glen Madsen and respectfully moves this Court to reconsider its order of May 6, 1955, and submits this amended petition for a Writ of Habeas Corpus, as follows:

I.

That petitioner incorporates herein, by reference, his original petition for a writ of habeas corpus heretofore filed in Bellingham, Washington with the clerk of the above-entitled Court bearing the same title as above set forth and bearing cause number 149, the same being directed to this Court.

II.

That petitioner alleges that as a matter of law his original petition was sufficient to warrant granting the relief therein prayed for.

III.

That petitioner with more particular reference to paragraph XXII of his original petition alleges the following facts:

That Section 2255 of Title 28 U.S.C.A., is and has been wholly a hardship in the extreme to petitioner. That the remedy by motion under that section is and has been completely inadequate and ineffective to test the legality of petitioner's unlawful detention. That petitioner has sought relief in the trial Court, but, he has been unlawfully, unjustly, and arbitrarily denied the right to be heard by counsel of his own choosing, including Alaska counsel. That the trial Court has capriciously and without warrant foreclosed petitioner three times in his efforts to have counsel of his own choosing represent him in Alaska. That the trial Court has twice arbitrarily and unjustly denied petitioner the right to be represented by counsel of his own choosing, including Alaska counsel, in his efforts to obtain relief under Section 2255 of Title 28, U.S.C.A. That one of petitioner's attorneys has been arbitrarily and unjustly denied the right to even comply with the Alaska Court's rules in regards to admission to practice. That Judge Folta has openly displayed his feelings and his inability to sit as an impartial jurist, and has, in the published opinion of *In Re*

Davis, 128 Fed. Supp. 283, judicially declared, without evidence, that petitioner

“deliberately provoked an altercation with the deceased, who was with his own party, then drove to Ketchikan, armed himself with a pistol, and returned to the scene. He pistol-whipped a teen-ager in the front seat of the car into insensibility, and shot and killed the other, who was apparently asleep in the rear seat.”

That this Court, in its decision and order of May 6, 1955, has stated:

“It must be conceded from the petition and accompanying exhibits herein that petitioner has sought relief under Section 2255 and that the sentencing court has neither yielded nor denied relief.”

That petitioner is not obliged to sit back and rely on a Federal Judge to act in his behalf when such Federal Judge has displayed personal anger and meted out continuous injustice to petitioner in all matters concerning petitioner which have directly or indirectly come within his judicial reach. That petitioner alleges there are many other existing facts and special circumstances which deprive him of an opportunity and capacity to fairly or otherwise seek relief under Section 2255. Petitioner alleges that such other existing facts and special circumstances alone entitle him to a hearing, and that the United States Supreme Court in the case of *Palmer v. Ashe* 72 S. Ct. 191, 342 U.S. 134 (1951)

has so held. That petitioner alleges that Judge Folta has illegally, unjustly, and arbitrarily ordered his court clerk not to file petitioner's motion for relief under Section 2255, and that Judge Folta has capriciously and unlawfully refused to entertain petitioner's motion under Section 2255. That no order granting or denying petitioner relief under Section 2255 has been or will be entered by Judge Folta, because Judge Folta is totally prejudiced against petitioner and unwilling and unable to act fairly and independently of his personal feelings in anything or any cause concerning petitioner. That petitioner cannot appeal to the Court of Appeals of the Ninth Circuit as suggested in this Court's opinion of May 6, 1955, because there has been no order entered and will be no order entered by Judge Folta from which an appeal could be taken. Petitioner is stymied. The futility of appeal under such circumstances is illustrated in *Besselman v. City of Moses Lake* 146 Washington Decisions 261 (1955). That petitioner is spending time in confinement under an illegal sentence and that the only adequate and effective remedy to test the legality of his detention and restore his liberty is Habeas Corpus.

J. LAEL SIMMONS

KENNETH DAVIS, and

WM. H. SIMMONS,

Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed May 10, 1955.

[Title of District Court and Cause.]

MEMORANDUM DECISION AND ORDER
DENYING MOTION TO RECONSIDER
AND DISMISSING AMENDED PETITION

Petitioner has filed a further pleading in the above-entitled matter captioned "Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus." In connection herewith he has also filed "Petitioner's Third Memorandum of Authorities" and "Second Request of Kenneth Glen Madsen, Petitioner."

On May 6, 1955, this court signed and filed a written decision and order of dismissal wherein for reasons set forth the court concluded it was without jurisdiction to entertain the petition and dismissed it.

Passing the question of whether petitioner's "Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus" is properly before the court inasmuch as petitioner has indicated he will seek relief from a higher court if he is denied a hearing on his petition it appears advisable to consider said motion and amended petition on its merits.

Paragraph I of the amended petition incorporates by reference the original petition.

Paragraph II alleges the sufficiency of the original petition.

Paragraph III amplifies Paragraph XXII of the original petition by alleging certain matters. In substance, most of the allegations contained in Paragraph III of the amended petition restate alleged facts and accusations set forth or appearing in the original petition and accompanying exhibits.

In addition reference is made to Judge Folta's published opinion appearing in 128 F. Supp. 283 and to this court's decision and order of May 6, 1955. Also petitioner alleges in said Paragraph III "that Judge Folta has illegally, unjustly, and arbitrarily ordered his court clerk not to file petitioner's motion for relief under Section 2255, and that Judge Folta has capriciously and unlawfully refused to entertain petitioner's motion under Section 2255." The concluding portion of said Paragraph III includes the following statement: "That petitioner cannot appeal to the Court of Appeals of the Ninth Circuit as suggested in this Court's opinion of May 6, 1955, because there has been no order entered and will be no order entered by Judge Folta from which an appeal could be taken. Petitioner is stymied."

It is the opinion of the court that the amended petition contains no additional allegations of fact that would serve to give this court jurisdiction and the decision and order heretofore filed on May 6, 1955, is affirmed.

Referring to the allegation as to Judge Folta's actions with respect to petitioner's motion for relief under §2255, Judge Hastie's language in United

States v. Davis, 212 F. 2d 681 cited in this court's earlier decision is pertinent:

“Even if a district court should incorrectly dispose of a proper motion under Section 2255, the remedy would be by appeal and not any alternative habeas corpus petition.”

It is stated by petitioner he cannot appeal to the Court of Appeals of the Ninth Circuit because there has been no order entered by Judge Folta in the Alaska proceeding under §2255. 28 U.S.C.A. §1651 would appear to authorize procedure whereby petitioner may be granted relief from a higher court should he make sufficient showing with respect to the Alaska proceeding.

Counsel for petitioner in petitioner's third memorandum of authorities state “Section 2255 of Title 28 U.S.C.A., is not applicable to petitioner's case, as he has been adjudged guilty under Territorial Law and sentenced by a Territorial Court, and not a United States District Court. The same reasoning applies as in cases where a prisoner has been convicted under State Law, and sentenced by a judge of a State Court.”

The first paragraph of Section 2255 provides as follows:

“A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law,

or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.” (Emphasis supplied.)

Paragraph XXI of the original petition sets forth the judgment and commitment under which petitioner is now imprisoned as a federal prisoner. See also Exhibits “B” and “C.”

Petitioner’s contention might have been worthy of consideration prior to the amendment of Section 2255 on May 24, 1949. His position is without merit as the statute is now worded. See *Burke v. United States*, 103 A. 2d 347.

Petitioner’s motion for reconsideration and amended petition for writ of habeas corpus is hereby denied and dismissed.

Dated May 25, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Harold H. Hinshaw the Sheriff of Skagit County, Washington, and William B. Parsons the United States Marshal for the Western District of Washington, Northern Division, and The Honorable Herbert Brownell the Attorney General of the United States, and the District Court of the United States for the Western District of Washington, Northern Division.

You and Each of You Are Hereby Notified that the above-named petitioner, Kenneth Glen Madsen, feeling himself aggrieved, does hereby give this notice of appeal, and says:

That he will appeal from the Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition, heretofore rendered in these proceedings on May 25, 1955, by the Honorable William J. Lindberg, Judge of the above-entitled Court, and that said appeal will be taken to the United States Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington this 21st day of June, 1955.

J. LAEL SIMMONS,
KENNETH DAVIS, and
WM. H. SIMMONS,
Attorneys for Petitioner.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, Floyd Madsen, father of Petitioner, in the above-entitled action, as principal and National Surety Corporation, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States for the benefit of whomsoever it may concern in the penal sum of Two Hundred and Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed at Seattle this 16th day of June, 1955.

Whereas, on the twenty-fifth day of May, 1955, the above-entitled court rendered and entered a decision and order in the above-entitled cause denying petitioner's motion to reconsider and dismissing petitioner's amended petition for a writ of habeas corpus;

And Whereas, the above-named petitioner, feeling aggrieved by said decision and order and desiring to appeal from the same to the United States Court

of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, Therefore, the Condition of the above obligation is such, that if Floyd Madsen will pay all costs and damages that may be awarded against Petitioner on said appeal or on the dismissal thereof, not exceeding Two Hundred and Fifty (\$250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

FLOYD MADSEN,

By /s/ WM. H. SIMMONS,
One of His Attorneys.

[Seal] NATIONAL SURETY
CORPORATION,

By /s/ MILDRED PALITZKE,
Attorney-In-Fact.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ALL EXHIBITS
TO COURT OF APPEALS

This matter having come on duly and regularly this day, before the undersigned Judge of this Court, upon the oral motion of Wm. H. Simmons, one of petitioner's (appellant's) attorneys herein, for an order directing the clerk of this court to transmit all exhibits heretofore filed in these proceedings to the clerk of the Court of Appeals for

the Ninth Circuit, as part of the record on appeal, and this Court being thoroughly and judicially advised in and of the premises, makes the following order:

Ordered that the clerk of this Court transfer to the clerk of the Court of Appeals for the Ninth Circuit, as part of the record on appeal, all exhibits heretofore filed in these proceedings which constitute petitioner's exhibits "B," "C," and "D," if and when petitioner files his notice of appeal and cost bond.

Done in Open Court this 21st day of June, 1955.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WM. H. SIMMONS,
One of Petitioner's Attorneys.

Received June 21, 1955.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith the following original documents and papers in the file dealing with the above cause as the record on appeal herein from the Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition rendered May 25, 1955, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Petition for a Writ of Habeas Corpus, including Exhibit "A," filed April 13, 1955.

2. Exhibit "B," consisting of transcript of Court record in Ketchikan, Alaska, filed April 13, 1955.

3. Exhibit "C," consisting of Reporter's transcript of record, filed April 13, 1955.

7. Exhibit "D," consisting of photostatic copy of letter to Judge Folta, filed April 26, 1955.

9. Decision and Order, filed May 6, 1955.

10. Motion to Reconsider and Amended Petition for Writ of Habeas Corpus, filed May 10, 1955.

13. Memorandum Decision and Order Denying Motion to Reconsider and Dismissing Amended Petition, filed May 26, 1955.

14. Notice of Appeal, filed June 22, 1955.

15. Cost Bond on Appeal, filed June 22, 1955.
16. Appellant's Designation of Certain Portions of the Record as Record on Appeal, filed June 22, 1955.
17. Order for Transfer of All Exhibits to Court of Appeals, filed June 22, 1955.
18. Statement of Points Relied Upon on Appeal, filed June 22, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 16th day of July, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ MARJORIE J. EDQUIST,
Deputy Clerk.

[Endorsed]: No. 14833. United States Court of Appeals for the Ninth Circuit. Kenneth Glen Madsen, Appellant, vs. Harold H. Hinshaw, Sheriff of Skagit County, Washington; William B. Parsons, United States Marshal for the Western District of Washington; and Honorable Herbert Brownell, Attorney General of the United States, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 22, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals

For the Ninth Circuit

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

J. LAEL SIMMONS

KENNETH C. DAVIS

WM. H. SIMMONS

LESLIE M. YATES

SIMMONS, SIMMONS & YATES

Attorneys for Appellant.

2101 Northern Life Tower,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

FILED

DEC -9 1955

PAUL P. O'BRIEN, CLERK

United States Court of Appeals

For the Ninth Circuit

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

J. LAEL SIMMONS

KENNETH C. DAVIS

WM. H. SIMMONS

LESLIE M. YATES

SIMMONS, SIMMONS & YATES

Attorneys for Appellant.

2101 Northern Life Tower,
Seattle 1, Washington.

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United States Court of Appeals

For the Ninth Circuit

KENNETH GLEN MADSEN, *Appellant,*

vs.

HAROLD H. HINSHAW, Sheriff of Skagit
County, Washington; WILLIAM B. PAR-
SONS, United States Marshal for the
Western District of Washington; and
Honorable HERBERT BROWNELL, Attor-
ney General of the United States,
Appellees.

No. 14833

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant filed his petition for Habeas Corpus in the United States District Court for the Western District of Washington, Northern Division (R. 3 to 82). It was dismissed without the District Court entering a show cause order or holding a hearing (R. 82 to 92). Appellant then filed a motion to reconsider the order of dismissal and also an amended petition for a writ of Habeas Corpus (R. 92 to 95). The motion to reconsider was denied and, without granting a show cause order or holding a hearing, the amended petition was dismissed (R. 96 to 99). No other pleadings were filed.

JURISDICTION OF THE DISTRICT COURT

Under both Article I, Section 9, of the United States Constitution, and under Sections 2241 through 2254 of Title 28 U.S.C.A., appellant had the right to petition the District Court for Habeas Corpus relief and the District Court had jurisdiction to grant him a hearing on the allegations of his petition and, upon his meeting his burden of proof concerning their verity, to grant the writ. Appellant contends 28 U.S.C.A. § 2255 is not applicable to the courts of Alaska when they sit as Alaska Territorial District Courts rather than as United States District Courts and, therefore, that Section 2255 did not deprive the District Court at Seattle, Washington, of jurisdiction. Appellant also contends that, even if 28 U.S.C.A. § 2255 is applicable to Alaska Territorial Courts, it is inadequate and ineffective in his case to test the legality of his detention; and that the sentencing court has neither yielded nor denied him relief and that under the very provisions of § 2255 the District Court of the Western District of Washington had jurisdiction of his Habeas Corpus proceeding.

JURISDICTION OF COURT OF APPEALS

The jurisdiction of the United States Court of Appeals for the Ninth Circuit rests in Title 28, U.S.C.A. § 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decisions of the District Courts of the United States. Appellant has, pursuant to Rule 73 of the Federal Rules of Civil Procedure, given due and proper Notice of Appeal (R. 100) and has filed a proper cost bond (R. 101, 102) and has otherwise prosecuted his appeal.

STATEMENT OF THE CASE

On August 6, 1954, appellant became involved in an incident in the Territory of Alaska at Ketchikan, which resulted in the death of one Raymond Tamatsu Aria, by shooting (R. 4, 5). Within a few hours of the shooting appellant was arrested and incarcerated, and on October 25, 1954, he was indicted for First Degree Murder by a Grand Jury (R. 4, 5). This Grand Jury sat for the District Court for the District of Alaska and charged appellant with violation of section 65-4-1 of the Alaska Compiled Laws Annotated (1949), which section defines Murder in the First Degree. Appellant was sixteen years of age at the time of the shooting. In Alaska, First Degree Murder is a capital offense, it carries with it a mandatory death penalty unless the jury affirmatively recommends life imprisonment (R. 4, A.C.L.A. § 65-4-1 and § 65-4-2).

On December 7, 1954, it was adjudged, by the District Court for the District of Alaska, that appellant "... has been found guilty on his plea of guilty to the crime of Second Degree Murder, the same being an offense ... included in the crime of First Degree Murder as charged in the Indictment ...". It was also adjudged that appellant "... is hereby committed to the custody of the attorney general ... for imprisonment for a period of twenty-five (25) years" (R. 23, 24).

Within a few days after this commitment appellant was en route to the Federal Reformatory at El Reno, Oklahoma. The route of his journey took him to Seattle, Washington. Appellant's present attorneys secured an order from the Justice Department in Washington,

D.C., causing appellant to be stopped and held in Seattle. Subsequently appellant was transferred to and held in the Skagit County, Washington, Jail at Mount Vernon, Washington. This action by the Justice Department was for the sole purpose of allowing appellant an opportunity to seek relief from his commitment through post-conviction remedies.

On April 13, 1955, appellant filed, in the United States District Court for the Western District of Washington, Northern Division, his petition for a Writ of Habeas Corpus. In his petition appellant alleged that he had secured from the clerk of the Alaska District Court a true and complete transcript of all court records in his Alaska case and that he had also secured a true and complete transcript of the reporter's record of what transpired in the Alaska District Court, and that he would file these documents as exhibits with his petition (R. 25). This he did (R. 85). On May 6, 1955, the District Court, without granting an order to show cause, or holding a hearing, entered a decision and order dismissing the petition (R. 82 to 92).

On May 10, 1955, appellant filed a written motion asking the District Court to reconsider its order of May 6, 1955, and, at the same time, he also filed an amended petition for a Writ of Habeas Corpus (R. 92 to 95). On May 26, 1955, the District Court again, without granting an order to show cause or holding a hearing, entered a memorandum decision and order denying the motion to reconsider and dismissing the amended petition (R. 96 to 99). It is from this latter order of dismissal that appellant appeals (R. 100).

In his amended petition for a Writ of Habeas Corpus, appellant alleges detailed facts (R. 3 to 82 and R. 92 to 95) showing, if true, that he was deprived of both due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and of his right to counsel as guaranteed by the Sixth Amendment to said Constitution. He also properly makes allegations concerning his alleged unlawful detention, within the territorial jurisdiction of the District Court (R. 3, 4). His other allegations, summarized, are:

That he was a youth sixteen years of age at the time of the alleged crime (R. 4, 41, 42, 45), and but seventeen years of age at the time he petitioned the District Court for Habeas Corpus relief (R. 14, 45); that he was unlearned, inexperienced, unqualified and incapable of asserting his legal rights, protecting his interests or of representing himself in a criminal proceeding (R. 20, 21); that he had only an eighth-grade education (R. 14), was entirely unversed in the law (R. 21, 44), and had no qualities of learning or experience calculated to enable him to protect himself in the give-and-take of a courtroom trial (R. 21); that a few days after his incarceration, and as a result of the shock incident to the alleged crime, his mother died (R. 45, 52), and he was left in a mental state of quandary, confusion and bewilderment (R. 45); that he was denied the right to see his father until after he was committed to await action of the Grand Jury on a charge of Murder in the First Degree (R. 14); and, that he worried a great deal about his folks not coming to see him while in jail, because his family had always been very close (R. 52). He further alleges that the Alaska District

Court was without jurisdiction to even make the record pursuant to which he now stands committed for twenty-five years imprisonment (R. 14), because his rights as a juvenile, as defined by the Alaska juvenile laws (R. 8 to 13), though never waived by word or action (R. 13), were totally and wrongfully denied him, all to his extreme prejudice (R. 13). He further alleges that he and his father employed one J. Lael Simmons of Seattle, a well-qualified, competent attorney of his own choosing to represent him (R. 5, 6, 7) and that without notice to himself or his counsel (R. 7, 43), he was improperly, summarily, capriciously and arbitrarily denied the right to be heard or represented by this counsel (R. 7, 40); that this counsel was, without notice or hearing and arbitrarily (R. 8), capriciously and without warrant (R. 7, 92) summarily ejected from further participating in the case on the very day appellant was to face trial on a First Degree Murder charge (R. 7, 43), although this counsel was thoroughly prepared to proceed to trial (R. 5, 6, 7, 42), and that appellant was thereby greatly prejudiced in the defense of his case (R. 7); that, as a result of the summary ejection of his counsel, he was bewildered and confused and sick at heart, and when he sought the guiding hand of his counsel, who was present in the courtroom, he was, without cause, denied the right to even communicate with him (R. 7, 40); that he thereafter sought a reasonable continuance in order that he might secure other competent counsel of his own choosing, but that his request was abruptly, unjustly, wrongfully, and against all American standards of fair-play dogmatically denied (R. 15), in spite of the fact that the court

was thoroughly informed that he could and would obtain another counsel of his own choosing if given a reasonable opportunity to so do (R. 15, 16); that he was compelled, against his will, pursuant to definite directions of the court, to take a pauper's oath (R. 15, 16, 44, 54), so that the court might appoint attorneys to represent him (R. 16); that his hopes for a fair trial were shattered when his chosen attorney was ejected (R. 54); that he was afraid of the judge, everybody stared at him, he felt uneasy and "beat" and would probably have done anything he was told to do at the time of taking this pauper's oath (R. 54); that he was again denied a requested continuance (R. 61), so he might secure other counsel of his own choosing (R. 61, 62); that the court appointed two unwilling young attorneys, who knew nothing about the case, to represent him, wholly against his stated wishes (R. 16), although these same two attorneys had, only minutes previously, stated in open court that they did not want to have anything to do with the case, that in no event would they go to trial on appellant's behalf and that appellant did not want them to have anything to do with the case (R. 17); that his two appointed attorneys requested a reasonable continuance, which request was, without just cause, arbitrarily denied (R. 18) and these appointed attorneys were thereby denied adequate time in which to prepare appellant's case (R. 45); that these appointed attorneys, by a despotic misuse of judicial power (R. 18), were denied the right to consult with appellant's chosen counsel or avail themselves of any of the fruits of his three months labor on the case, under pain of contempt (R. 18, 40, 45);

that, as a result, these appointed attorneys were obliged to enter upon appellant's trial unprepared (R. 19); that these appointed attorneys were unqualified, inadequate, inexperienced, incompetent (R. 17, 18), and fell below the very minimum standards required of attorneys defending a person charged with a capital offense (R. 19), which resulted in appellant's trial attempt being a farce, sham and a mockery of justice (R. 19); that of these two appointed attorneys, the one with the wider experience, just minutes before his appointment, told appellant that he did not want to handle the case and was not qualified for a murder trial (R. 19), and subsequent to his appointment this same attorney told appellant he did not want to handle the case, but he was "stuck" with it (R. 19); that this same attorney informed appellant his case was very weak and the prosecution's was very strong, and appellant would probably be convicted and there was a good chance, on conviction, he would be hanged (R. 19, 20); that these appointed attorneys, individually (R. 19, 20), and in concert with the United States District Attorneys (R. 56, 62, 63) and the Alaska District Court judge (R. 20, 64, 66) induced and coerced appellant into a position of offering (R. 21, 22, 84) to withdraw his plea of not guilty to the crime of First Degree Murder and enter a plea of guilty to the crime of Second Degree Murder; that his offer to so plead was a natural result of these inducements, and appellant through fear, misrepresentation, ignorance, lack of knowledge of our spoken language, lack of knowledge of the ways of judicial procedure, persuasion based on false statements, lack of comprehension of the consequences of his act

and because of his youth and inexperience was, blindly led into that position (R. 21); that he never did withdraw his plea of not guilty to the crime of Murder in the First Degree (R. 22), and that he never in person or otherwise, consciously or wittingly entered a plea of guilty to the crime of Second Degree Murder (R. 22). He further alleges that he has twice sought relief under Title 28 U.S.C.A. § 2255 by proper and adequate motion, through two different attorneys, but he has arbitrarily been denied the right to even be heard by the trial court (R. 25), and that the trial judge refused to permit counsel of his own choosing, other than J. Lael Simmons, including Alaska counsel, to be heard or to file his motion under § 2255 (R. 25). He further alleges that the remedy by motion under § 2255 has been wholly a hardship in the extreme (R. 93); that the Alaska court has twice foreclosed him in his efforts to obtain relief under § 2255 (R. 93); that said court ordered its clerk not to file his motion under § 2255 (R. 95); that no order granting or denying him relief under § 2255 has been or would be entered because the trial court was totally prejudiced and unwilling and unable, to act fairly and independently in anything concerning appellant (R. 95); that no order having been or to be entered by the trial court appellant could not appeal and was stymied (R. 95), and that § 2255 was wholly inadequate and ineffective to test the legality of his detention (R. 25, 93). He further alleges that he is not guilty of any crime (R. 14, 18, 42, 56), and that he has never been in trouble except for traffic violations (R. 52); that his only effective remedy for relief from his unlawful detention is Habeas Corpus, and that at no time

in these proceedings, from the time of the summary ejection of the counsel of his choice, Mr. Simmons, *ex parte* and without a hearing or just cause, up until appellant was on his way to El Reno, Oklahoma, did he have the guiding hand of counsel of his own choosing (R. 40).

These summarized allegations present the constitutional questions involved, which are: (1) whether or not appellant has been deprived of his constitutional right to Habeas Corpus as guaranteed by Article I, Section 9; (2) whether or not he has been deprived of his liberty without due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States, and (3) whether or not he has been deprived of his liberty without benefit of counsel as guaranteed by the Sixth Amendment of the Constitution of the United States. These questions are all raised by the allegations of the amended petition for a Writ of Habeas Corpus, which was the only pleading before the District Court. The District Court also had the entire trial court record before it (R. 85) at the time of making the ruling which is the basis of this appeal.

SPECIFICATION OF ERROR

After considering the same on the merits, the United States District Court for the Western District of Washington, Northern Division, erred in dismissing Appellant's Amended Petition for a Writ of Habeas Corpus, without granting a show cause order and holding a hearing.

ARGUMENT

I. The doctrine of *res judicata* has no application to Habeas Corpus cases.

The District Court, in its Memorandum Decision and Order (R. 96) said, *inter alia*:

“Passing the question of whether petitioner’s Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus is properly before the court . . . ”

This language by the Washington District Court stems from the fact that the Court was concerned about whether or not the doctrine of *res judicata* applied to Habeas Corpus cases and therefore foreclosed the Appellant from bringing his amended petition. Appellant urged upon the Court that *res judicata* did not apply to Habeas Corpus cases and the Court passed the question. Appellant does not seek to labor the point of *res judicata* on appeal. However, cases deemed by Appellant to be directly in point, holding that the doctrine *res judicata* does not apply to Habeas Corpus cases, are here cited out of an abundance of caution. Supreme Court cases: *Salingen v. Loisel* (1923) 265 U.S. 224, 44 S.Ct. 519, 521; *Wong Doo v. United States* (1924) 265 U.S. 239, 44 S.Ct. 524; *Waley v. Johnston* (1942) 316 U.S. 101, 62 S.Ct. 964; *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, 1062; *Darr v. Burford* (1950) 339 U.S. 200, 70 S.Ct. 587, 596; *Brown v. Allen* (1953) 344 U.S. 443, 73 S.Ct. 397, 411; *United States v. Shaughnessy* (1954) 347 U.S. 265, 74 S.Ct. 499, 503; *Massey v. Moore* (1954) 348 U.S. 105, 75 S.Ct. 145. Court of Appeals cases: *Coggins v. O’Brien* (1 Cir., 1951) 188 F.2d 130; *United States v. Shaughnessy* (2

Cir., 1953) 206 F.2d 392; *United States v. Shaughnessy* (2 Cir., 1953) 206 F.2d 897; *United States v. Hiatt* (3 Cir., 1944) 141 F.2d 664; *United States v. Burke* (3 Cir., 1949) 173 F.2d 544; *Slaughter v. Wright* (4 Cir., 1943) 135 F.2d 613; *Wells v. United States* (5 Cir., 1947) 158 F.2d 833; *Collins v. United States* (8 Cir., 1953) 206 F.2d 918; *Hall v. Johnston* (9 Cir., 1937) 91 F.2d 263; *Fisher v. Johnston* (9 Cir., 1938) 95 F.2d 36; *Kerr v. Squier* (9 Cir., 1945) 151 F.2d 308; *Waley v. Johnston* (9 Cir., 1947) 163 F.2d 556; *Chessman v. Teets* (9 Cir., 1955) 221 F.2d 276; *Pope v. Huff* (U.S. Court of Appeals for D.C., 1944) 141 F.2d 727; *Rookard v. Huff* (U.S. Court of Appeals for D.C., 1944) 145 F.2d 708; *Dorsey v. Gill* (U.S. Court of Appeals for D.C., 1945) 148 F.2d 857.

II. Uncontroverted factual allegations of a petition for a Writ of Habeas Corpus MUST be accepted as true, so long as they are not repudiated by the records of the trial court and it cannot be said, as a matter of law, that they are insufficient to raise a jurisdictional or constitutional question.

In *Frank v. Mangum* (1915) 237 U.S. 309, 35 S.Ct. 582, 596, Judge Holmes' dissenting opinion (concurrent with Judge Hughes) stated the present law. In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, Judge Holmes, this time writing for the majority, again stated the present law. His dissent in the *Frank v. Mangum* case does not differ from his opinion in *Moore v. Dempsey*. In *Frank v. Mangum*, Judge Holmes said:

“Of course we are speaking of the case made by the petition, and whether it ought to be heard.

Upon allegations of this gravity in our opinion it ought to be heard . . .”

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 579, the Supreme Court said:

“The Government’s contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.”

In *Williams v. Kaiser* (1945) 323 U.S. 474, 65 S.Ct. 363, 365, the Supreme Court said:

“The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true.”

In *House v. Mayo* (1945) 324 U.S. 49, 65 S.Ct. 517, 520, the Supreme Court said:

“Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner’s allegations are true.”

In *White v. Ragen* (1945) 324 U.S. 766, 65 S.Ct. 978, 980, the Supreme Court said:

“Since the Supreme Court of Illinois dismissed both petitions without requiring respondent to answer, we must assume that the petitioner’s allegations are true.”

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 117, the Supreme Court said:

“As no response was filed or evidence received in the district court, we accept as true all well-pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree.”

In *Palmer v. Ashe* (1951) 342 U.S. 134, 72 S.Ct. 191, 192, the Supreme Court said:

“We must look to the petition and answers to determine whether the particular circumstances alleged are sufficient to entitle petitioner to a judicial hearing.”

In *U.S. v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263, 267, the Supreme Court said the question is whether or not the petition:

“ * * * states grounds to support a collateral attack on his sentence and raises substantial issues of fact calling for an inquiry into their verity.”

In *U.S. v. Morgan* (1954) 346 U.S. 502, 74 S.Ct. 247, 253, the Supreme Court said:

“In this state of the record we cannot know the facts and thus we must rely on respondents’ allegations.”

In *Massey v. Moore* (1954) 348 U.S. 105, 75 S.Ct. 145, the Supreme Court said:

“On the present pleadings we must take as true the allegation of mental incapacity at the time of the trial.”

“We do not intimate an opinion on the merits, for we do not know what facts the hearing will produce. We only rule that if the allegations charged are proven, petitioner has been deprived of his liberty without due process of law.”

In *Chessman v. Teets* (Oct. 17, 1955) U.S., 76 S.Ct. 34, the Supreme Court said:

“On the record before us, there is no denial of petitioner’s allegations. The District Court, without issuing the writ or an order to show cause, dismissed the application as not stating a cause of action.

“Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed.”

Court of Appeals cases for the Ninth Circuit, directly in point, follow:

Price v. Johnston (9 Cir., 1942) 125 F.2d 806:

“No hearing was had in this case, the court entering its order on the pleadings filed. The question before us is whether the court below erred in not granting a hearing. To state it differently, Did it appear ‘from the petition itself that the party’ was ‘not entitled’ to a writ, or did the application and traverse raise substantial issues of fact so as to require the court below to grant petitioner a hearing?”

Lynch v. Johnston (9 Cir., 1947) 160 F.2d 950, 951:

“Where, as here, no order to show cause is issued and no return is made or hearing had, the law requires that all of the allegations of fact contained in the petition be treated as true.”

Carlson v. Landon (9 Cir., 1950) 186 F.2d 183, 188:

“There is no denial of petitioner’s allegations as to residence, family status, his attendance upon hearings under the 1947 warrant, and these allegations must be taken as true.”

Mangaoang v. Boyd (9 Cir., 1950) 186 F.2d 191, 194:

“We deem it advisable at this juncture to mention the rule that the undenied allegations of the pleadings are to be taken as true.”

Thomas v. Teets (9 Cir., 1953) 205 F.2d 236, 238 (Seven Judges, Certiorari Denied 74 S.Ct. 240):

“Thomas appeals from an order denying his application for a writ of habeas corpus without issuing the writ or an order to show cause and the first question before us is whether his application states a ground which, if true, warrants the issuance of the writ or show cause order.

“We are required to assume these allegations are true.”

Other Court of Appeals cases, directly in point, are:

United States v. Rosenberg et al. (2 Cir., 1952) 200 F.2d 666, 668:

“Since Judge Ryan held no hearing at which testimony could be presented, it is necessary to treat as true all facts stated in the petitions and in accompanying affidavits and exhibits, and to disregard all contrary statements of fact in the government’s affidavits.”

United States v. Hiatt (3 Cir., 1944) 141 F.2d 664:

665 “Upon these appeals, however, we must assume that the relator’s allegations are true since the question before us is whether the district court erred in refusing the issuance of writs under which their truth might be inquired into.”

United States v. Baldi (3 Cir., 1952) 198 F.2d 113, 117:

“If relator’s allegations are true, his confession was clearly coerced, and the concept of due process would void his trial * * * [citation] * * * Hence, on the basis of the record before us, the district court erred in dismissing the petition without a hearing.”

United States v. Baldi (3 Cir., 1952) 195 F.2d 815, 822:

“ * * * the allegations of the petition that vital evidence ‘was wilfully concealed’ must be taken to be true since no hearing was had.”

United States v. Handy (3 Cir., 1953) 203 F.2d 407
(Seven Judges, *Certiorari* denied 74 S.Ct. 103):

“ * * * the ‘undisputed’ and ‘incontrovertible’ facts which appear from the record made in the Court of Oyer and Terminer are insufficient to controvert the broad allegations of the petition.”

Atkins v. Moore (5 Cir., 1955) 218 F.2d 637:

“It seems clear to us that, if what petitioner alleges is true, his conviction should not be allowed to stand.”

Loper v. Ellis (5 Cir., 1955) 224 F.2d 901, 903:

“Taking these allegations of the petition at their face value, as we necessarily must do * * * ” (The court disposed of the case on this premise.)

United States v. Sturm (7 Cir., 1950) 180 F.2d 413
(§ 2255 motion):

“Since the trial court denied the motion without granting a hearing thereon or making findings of fact and conclusions of law with respect thereto, its order was proper only if ‘the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * * ’ That,

then, is the sole question before us on this appeal. In its resolution, we must, of course, accept as true and correct the averments of fact contained in the motion, insofar as they are not inconsistent with the record, and, on that basis, proceed to determine if they entitle defendant to the hearing denied him.”

United States v. Davis (7 Cir., 1954) 212 F.2d 264:

“Thus, since the District Court denied the motion without a hearing and attendant findings of fact and conclusions of law, its order was proper only if the motion and record show conclusively that the defendant was entitled to no relief. Otherwise, the order must be set aside and the cause remanded for a hearing [citing *U. S. v. Hayman*]. We must, of course, in considering the narrow question thus presented, accept as true the allegations of fact contained in the motion except as they may be contradicted by the record.

“It is not open to doubt that the defendant’s motion alleges matters of a serious and substantial character.”

Sisk v. Overlade (7 Cir., 1955) 220 F.2d 68:

“Upon the filing of the petition the district judge had authority to issue the writ or he could have issued an order to show cause why the writ should not be granted. Title 28 U.S.C.A. § 2243. He did neither, but entered an order denying the writ without a hearing. This procedure could be followed only on the basis that the facts contained in the petition showed that petitioner was not entitled to a writ; in other words, that a *prima facie* case had not been shown. In this posture there is no denial or answer to any of the allegations of

fact in the petition, and on this appeal we must consider such allegations as being true.”

White v. Pescor (8 Cir., 1946) 155 F.2d 902:

“Sections 454 to 461 [now sections 2242 and 2243] both inclusive, Title 28 U.S.C.A., prescribe the procedure to be followed, and we cannot agree that the allegations of the petition to the effect that petitioner was denied his constitutional right to assistance of counsel were insufficient as a matter of law to entitle plaintiff to the relief sought.”

Davis v. United States (8 Cir., 1954) 210 F.2d 18:

“Observations and experience compel the conclusion that in many instances allegations such as those now under consideration are not honestly made and constitute barefaced perjury. In many other instances lapse of time and wishful thinking ripen into a conviction that events were as alleged, when in fact they were not. But however onerous the burden may be, the protection of the rights of persons in the comparatively few meritorious cases requires the careful adherence to our traditions of judicial proceedings in all cases, in order that the few may be discovered.”

Ex Parte Rosier (U.S. Ct. of App. for Dis. of Col., 1942) 133 F.2d 316:

“These allegations alone, if true—and as we have pointed out above they must at this stage of a habeas corpus proceeding be taken as true, as if on demurrer, and this even if improbable or unbelievable (which on their face they were not)—stated a cause of action for release.”

It was also proper for the appellant to incorporate, by reference, his first petition within his second. (Cf. *Thomas v. Duffly* (9 Cir., 1950) 191 F.2d 360.)

III. When it cannot be said, as a matter of law, that the factual allegations of a petition for Writ of Habeas Corpus are insufficient to raise a jurisdictional or constitutional question, then it becomes the ABSOLUTE DUTY of the petitioned court to hold a hearing, receive evidence and pronounce the allegations true or false.

In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, 267, the Supreme Court said:

“We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable the District Judge should find whether the facts alleged are true . . . ”

In *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1023, the Supreme Court said:

“The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.”

“The scope of inquiry in habeas corpus proceed-

ings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, ‘it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court’ and the petitioned court has ‘power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter, or to the person, even if such inquiry [involves] an examination of facts outside of, but not inconsistent with, the record.’”

“ . . . applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to ‘dispose the party as law and justice require.’”

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 577, the Supreme Court said:

“ . . . a judicial inquiry involves the reception of testimony, as the language of the statute shows.”

“The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner’s right to have those issues heard and determined in the manner the statutes prescribes.”

On page 579, the Court said:

“In other Circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the Judge shall proceed ‘to determine the facts of the case, by hearing the testimony and arguments.’ ”

“Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined

whether the petitioner has carried his burden of proof and shown his rights to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence."

Allegations concerning the denial of a twenty-four hour continuance in order that the accused might consult counsel are found in *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, and the Supreme Court says:

"These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague."

In *U. S. v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263, the Supreme Court said:

"Respondent, denied an opportunity to be heard, 'has lost something indispensable, however convincing the *ex parte* showing.'"

In *U. S. v. Shaughnessy* (1954) 347 U.S. 260, 74 S.Ct. 499, 504, the Supreme Court said:

"Of course, he may be unable to prove his allegation before the District Court, but he is entitled to the opportunity to try."

In *United States v. Uhl* (2 Cir., 1943) 137 F.2d 858:

"In several recent cases the Supreme Court has discussed the procedure to be followed on applications for writs of habeas corpus. * * * [citations] * * * These authorities make it clear, as the district court recognized, that if the pleadings present any material issues of fact, the petitioner is entitled to have those issues determined in the manner prescribed by section 461 [now §2243] of 28 U.S.C.A., that is, 'by hearing the testimony and arguments.' "

In *United States v. Burke* (3 Cir., 1952) 196 F.2d 785, 788:

“The Supreme Court has set forth the rule that a writ of habeas corpus searches the record back of the commitment. The writ places ‘a duty on the court to explore the foundations, and pronounce them false or true.’ *Hill v. U. S. ex rel. Wampler* (1936) 298 U.S. 460, 467, 56 S.Ct. 760, 763, 80 L.Ed. 1283.”

In *U. S. v. Handy* (3 Cir., 1953) 203 F.2d 407, it was held that, if the records do not controvert the allegations, petitioner, on demand, must be allowed:

“an opportunity to support his allegations by evidence and appropriate findings of fact and conclusions of law must be made.”

In *Behrens v. Hironimus* (4 Cir., 1948) 166 F.2d 245, 248:

“This duty of investigation can be discharged only by the judge at a hearing where evidence is received. *Holiday v. Johnston*, 313 U.S. 342, 550, 61 S.Ct. 1015, . . . ”

In *McCrea v. Jackson* (6 Cir., 1945) 148 F.2d 193:

“But in *Walker v. Johnston*, 312 U.S. 275, 285, 61 S.Ct. 574, 579, 85 L.Ed. 830, the Supreme Court declared that if an issue of fact is presented, the only permissible procedure is for the judge to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. Nothing less is deemed to satisfy the command of the statute that the judge shall proceed ‘to determine the facts of the case, by hearing the testimony and arguments.’ ”

In the *McCrea v. Jackson* case the court refers to the

case of *Holiday v. Johnston* (1941) 313 U.S. 342, 61 S.Ct. 1015, and says:

“It was pointed out that Congress has seen fit to lodge in the judge the duty of investigation; that the petitioner must be afforded the right plainly accorded him by the statute of testifying before the judge; that neither the hearing of the testimony of the witnesses nor the weighing and appraising thereof may be delegated to a master; but that the judge personally must perform this function, find the facts and base his disposition of the cause upon his findings. Upon these principles, the discharge of the writ of habeas corpus was reversed and the cause remanded for a determination of the issues of fact upon a further hearing.”

In *Wheatley v. U. S.* (10 Cir., 1952) 198 F.2d 325, the court speaking on the matter of the sufficiency of the petitioner's allegations said at page 327:

“It may be that the charge is a figment of petitioner's imagination, but it cannot be said as a matter of law that the allegation was so frivolous that it could be brushed aside without a hearing.”

In *Kirk v. Squier* (9 Cir., 1945) 150 F.2d 3, 5 (footnote 2), we find additional power in the petitioned court:

“The Federal District Court takes judicial notice of the statutes and judicial decisions of the State of Calif. * * * ”

In *McGuire v. Hunter* (10 Cir., 1943) 138 F.2d 379:

“The remaining contention is that the court below failed to accord petitioner a full and complete hearing. Where in a case of this kind a material issue of fact is presented, it is the duty of the court to have the petitioner produced in court and hold

a hearing at which an opportunity is afforded to present evidence.”

IV. Habeas Corpus is the “Great Writ of Freedom.” It is often an individual citizen’s only safeguard against being deprived of his life or liberty in violation of his constitutional rights. Habeas Corpus is guaranteed by the Constitution of the United States and there is no higher duty than to maintain it unimpaired.

In *Frank v. Mangum* (1915) 237 U.S. 309, 35 S. Ct. 582, the Supreme Court said:

“But habeas corpus cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”

In *Copeland v. Archer* (1931) 50 F.2d 836, 838, the court said:

“The Writ of Habeas Corpus is a summary means of obtaining justice, but it is a real guarantee of the rights of the individual citizen.”

In *Bowen v. Johnston* (1939) 306 U.S. 19, 59 S.Ct. 442, 446, the Supreme Court said:

“It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.”

In *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, the Supreme Court said:

“The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights.”

V. If the jurisdictional limitations and requirements concerning juveniles as set forth in the Alaska juvenile laws have not been complied with, the Alaska District Court has no jurisdiction over a juvenile and cannot adjudge a juvenile guilty of a crime or commit a juvenile to be imprisoned.

The Alaska juvenile laws are complete and are not ambiguous (51-3-1 to 51-3-19 A.C.L.A. 1949, R. 8 to 13).

In 31 Am. Jur. 792, Juvenile Courts and Offenders, §17, we find:

“In most jurisdictions the age limit is fixed at either sixteen, seventeen, or eighteen years. In some it exceeds eighteen years. The tendency of the more recent statutes is to make the age limit higher. The purposes of these statutes have a clear and distinct connection with age as related to discretion and character, and the legislatures have, in passing them, indulged the usual presumptions arising from human experience that there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under a certain age.”

Page 785 §4:

“In other words the welfare of the child lies at the very foundation of the statutory scheme.”

Page 796 §27:

“The nature of the jurisdiction is, therefore, like that of the statutes creating such courts, paternal and benevolent.

“The provisions of a statute for proceedings against juvenile delinquents in juvenile courts only, are to be construed as *establishing certain jurisdictional limitations and requirements and not merely personal rights or privileges in favor*

of the juvenile which the latter may waive or not as he desires.” (Emphasis added)

VI. The Sixth Amendment to the Constitution of the United States provides that an accused shall enjoy the right to have the Assistance of Counsel for his defense. If an accused does not competently and intelligently freely waive this right or if he is arbitrarily denied this right the Court is incomplete and without jurisdiction to render a valid judgment and commitment. This right includes the right to counsel of his own choosing.

In *Powell v. State of Alabama* (1932) 287 U.S. 45, 53 S.Ct. 55, the Supreme Court, after quoting the trial court proceedings in regard to the appointment of counsel, which proceedings were to some extent similar to the proceedings of the Alaska Court in the instant case, says:

“And in this casual fashion the matter of counsel in a capital case was disposed of.”

In the trial court an attorney addressing the court, said:

“MR. PARKS: Of course if they have counsel, I don’t see the necessity of the Court appointing anybody . . . ” (With this the Court agreed)

The Supreme Court continued:

“In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants . . . when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

“It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their last judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: ‘ * * * The record indicates that the appearance was rather *pro forma* than zealous and active * * *.’ Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.

“That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that every soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. ‘They * * * [defendants] * * * had little time or opportunity to get in touch with their families and friends * * * and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity of counsel that appeared immediately or shortly after their conviction.’

“It is hardly necessary to say that the right to counsel being conceded, a defendant should be af-

forded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.

“If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”

In *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1022, the Supreme Court said:

“The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’

“The ‘ * * * right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.’

“The determination of whether there has been an intelligent waiver of right to counsel must de-

pend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with the constitutional mandate is an essential jurisdictional prerequisite to a Federal Court’s authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the Court’s jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court’s jurisdiction at the beginning of a trial may be lost ‘in the course of the proceedings’ due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guarantee, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment or conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine ‘the facts for himself, when, if true as alleged, they make the trial absolutely void.’ ”

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 579, the Supreme Court said:

“If he did not voluntarily waive his right to counsel, or if he was deceived or coerced . . . into entering a plea, he was deprived of a constitutional right.”

In *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 467, the Supreme Court said:

“The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”

In *Williams v. Kaiser* (1945) 323 U.S. 474, 65 S.Ct. 363, 366, the Supreme Court said:

“The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing — a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused.”

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 118, 120, the Supreme Court said:

“Denial of effective assistance of counsel does violate due process.

“We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.”

In *Chandler v. Fretag* (1954) 348 U.S. 3, 75 S.Ct. 1, the Supreme Court said:

“Petitioner did not ask the trial judge to furnish him counsel rather, he asked for a continuance so

that he could obtain his own. The distinction is well established in this Court's decisions. *Powell v. State of Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158; *Betts v. Brady*, 316 U.S. 455, 466, 468, 62 S.Ct. 1252, 1258, 1259, 96 L.Ed. 595; *House v. Mayo*, 324 U.S. 42, 46, 65 S.Ct. 517, 520, 89 L.Ed. 739. **Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.** See *Palko v. State of Connecticut*, 302 U.S. 319, 324-325, 58 S.Ct. 149, 151, 82 L.Ed. 288. As this Court stated over 20 years ago in *Powell v. State of Alabama*, *supra*, 287 U.S. at pages 68-69, 53 S.Ct. at page 64:

“ ‘What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense'* (Italics added)." [Italics are court's]

"A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth. *Avery v. State of Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377; *House v. Mayo*, 324 U.S. 42, 46, 65 S.Ct. 517, 520, 89 L.Ed. 739; *White v. Ragen*, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348; *Hawk v. Olson*, 326 U.S. 271, 277-278, 66 S.Ct. 116, 119-120, 90 L.Ed. 61. By denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment.

"It follows that petitioner is being held by respondent under an invalid sentence. The judgment below, sustaining the denial of habeas corpus relief, is accordingly reversed." (Bold face emphasis only supplied)

Habeas Corpus may be sought even though plea of guilty was entered. The right to counsel as guaranteed by the 6th Amendment is applicable to those who enter such pleas as well as those convicted (*Evans v. Rives* (U.S. Court of Appeals for D.C., 1942) 126 F.2d 633).

In *Waley v. Johnston* (9 Cir., 1947) 163 F.2d 556,

this court held that compliance with Sixth Amendment is a condition precedent to jurisdiction.

In *Behrens v. Hironimus* (4 Cir., 1948) 166 F.2d 245, 247:

“Congress has liberalized and expanded the concept of the writ of habeas corpus in the interest of the protection of individual liberties so that the federal courts must now examine all the facts concerning a person’s detention and thereby insure that justice has been done [citing cases]. The Supreme Court has established that the guarantee of counsel by the Sixth Amendment to the Federal Constitution is a prerequisite which must be complied with in order to give a federal court jurisdiction to hear and determine a criminal case. Failure to provide an accused with adequate counsel, unless he has knowingly and intelligently waived this right, renders any conviction and sentence by such a court null and void, and one imprisoned thereby may be released by habeas corpus.” [Citing *Johnston v. Zerbst* and *Walker v. Johnston*]

VII. A federal court is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, or for any other acts of alleged misconduct, without first giving him notice that his disbarment is being considered and affording him an opportunity to be heard in his defense. A purported disbarment lacking these elements is void, and deprives the attorney of due process of law and deprives his client of his right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States.

In *Laughlin v. Wheat* (U.S. Court of Appeals D.C., 1937) 95 F.2d 101, although there was an existing statute allowing the court to strike an attorney's name, after a charge was filed, the Court said:

"The rule of general application is that all courts have power to punish attorneys as officers of same, for misbehavior in the practice of the profession, but the rule is also that in each instance where an attorney is charged by affidavit with fraud or malpractice the court on motion will as a preliminary step order him to appear and answer, and then deal with him as the facts may appear in the case. And this is true because upon a petition to disbar or suspend an attorney the latter has a right to notice and opportunity to be heard and therefore any order of disbarment or suspension entered upon an *ex parte* proceeding ought not to be sustained.

"In the instant case the petition shows, and the answer admits, that the order of suspension was entered without notice or hearing and without opportunity to the accused to explain the transaction and, if he could, to vindicate his conduct. While we entertain no doubt that a court has jurisdiction

even in an informal hearing in a proper case to strike the name of an attorney from its rolls, we know of no case in state or federal courts in which it was held it could be done without affording the attorney reasonable notice and an opportunity to be heard in his defense. This is even more the case where the offense charged is indictable and there has been no conviction."

In *United States v. Bergamo* (3 Cir., 1946) 154 F.2d 31, 35:

"In the case at bar it is unnecessary to decide what might be the law if an out-of-the-district attorney, not in good standing at the bar of which he was a member, had attempted to conduct the defense in the case at bar; nor need we decide the issue of whether a district court of the United States may require out-of-the-district counsel to have associated with him in a criminal case a member of the bar of the district court before which he seeks to appear. If these be necessary conditions they were met in the instant case. To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. Under the circumstances of the case at bar the defendants were deprived of the advice of counsel of their own choosing. Nor was their representation effective. Since they were deprived of a constitutional right the judgment of conviction pronounced by the court was void."

In *Cooper v. Hutchinson* (3 Cir., 1950) 184 F.2d 119, 123:

"We think it clear that limited to one case though the right of these attorneys to practice was, their standing with respect to this case was no different from that of any other regularly admitted

local lawyer. * * * While admission *pro hac vice* is stated in the rule to be in the discretion of the court, the rights and duties of an outside lawyer, once so admitted, appear to be the same as those of a local lawyer. We think that admission *pro hac vice*, as the rule seems to indicate, is for the entire 'cause' and that counsel so admitted in a capital case cannot be arbitrarily and capriciously removed without depriving their clients of rights conferred by the constitution."

In *In re Los Angeles County Pioneer Society* (9 Cir., 1954) 217 F.2d 190, 192:

"Appellant's contention is that such a proceeding without notice of its purpose and with its failure to afford an opportunity to oppose the disbarment, *contained in the already prepared order therefor*, denies him the due process of the Fifth Amendment in depriving him of his property in the right to practice law in the district.

"A federal court is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, where due process is denied him by failing to give him notice that his disbarment is being considered or by failing to give him an opportunity to prepare and present a defense." (Emphasis is by the Court)

VIII. The age and background of an accused are entitled to serious consideration in determining whether or not he has been afforded his constitutional rights or has competently, intelligently and knowingly waived them.

In *Powell v. State of Alabama* (1932) 287 U.S. 45, 53 S.Ct. 55, the Supreme Court said:

"The record does not disclose their ages, except

that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful and they are constantly referred to as 'the boys.' They were ignorant and illiterate."

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, 577, the Supreme Court said:

"[Petitioner] asserts that he attended school to the fifth grade and had had no further schooling or education, was entirely unversed in the law and unable and unqualified to represent or act for himself in a criminal proceeding;"

In *Williams v. Huff* (U.S. Court of App. D.C., 1944) 142 F.2d 91, 92, the court quotes *Bonner v. Moran* (U.S. Ct. of App. for D.C., 1941) 126 F.2d 121, with approval as follows:

"In deference to common experience, there is general recognition of the fact that many persons by reason of their youth are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights.

"The universal law, therefore, is that a minor cannot be held liable on his personal contracts or contracts for the disposition of his property."

In *Curtis v. Hiatt* (3 Cir., 1947) 161 F.2d 621, 623:

"Petitioner alleges that he was duped into waiving counsel and pleading guilty through the machinations of the government agent in whose custody he was placed. This allegation must be considered in conjunction with those of his youth and previous record. 'It follows that the District Court should take evidence and determine whether, in the light of his age, education and information, and all other pertinent facts, he has sustained the bur-

den of proving that his waiver was not competent and intelligent.' ”

In *Anderson v. Eidson* (8 Cir., 1951) 191 F.2d 989, the Court of Appeals reversed the District Court but quoted the following language of the District Court:

“I entertain a strong feeling that justice demands that an 18-year-old boy should be provided with counsel, regardless of whether he requested it or refused it, considering that the offenses with which he was charged were of a most grave nature * * *. If it were a case arising under the federal jurisdiction, I would unhesitatingly grant the writ and review the matter * * *.”

IX. It is a denial of due process of law to force an accused to trial without adequate time to prepare his defense.

In *Adams v. United States* (1943) 317 U.S. 269, 63 S.Ct. 235, 241, 242, the Supreme Court said:

“An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court.”

In *White v. Ragen* (1945) 324 U.S. 766, 65 S.Ct. 978, 980, the Supreme Court said:

“... it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.”

X. An accused who is induced and coerced into entering a plea of guilty has been deprived of due process of law.

In *Walker v. Johnston* (1941) 312 U.S. 275, 61 S.Ct. 574, the Supreme Court said:

“If he did not voluntarily waive his right to counsel, or if he was deceived or coerced . . . into entering a plea, he was deprived of a constitutional right.”

In *Waley v. Johnston* (1942) 316 U.S. 101, 62 S.Ct. 964, the Supreme Court said:

“In view of the fact that petitioner when he pleaded guilty had been represented by counsel, a majority of the court [Court of Appeals—Ninth Circuit] thought he could not by habeas corpus attack his sentence on the ground that his plea was coerced.

“The Government confesses error for the reason that the habeas corpus petition raises the material issue whether the plea was in fact coerced by the particular threats alleged which stand undenied on the record, and that upon that issue petitioner is entitled to a hearing in accordance with *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830.

“And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction.”

In *Palmer v. Ashe* (1951) 342 U.S. 134, 72 S.Ct. 191, 193, the Supreme Court said, of circumstances similar to appellant's at the time he entered his plea, the following:

“But that record does not even inferentially deny petitioner's charge that the officers deceived

him, nor does the record show an understanding plea of guilty from this petitioner, unless by a resort to speculation and surmise.

“Moreover, if there can be proof of what he charges, he is the victim of inadvertent or intentional deception by officers who, so he alleges, persuaded him to plead guilty to armed robbery by telling him he was only charged with breaking and entering, an offense for which the maximum imprisonment is only ten years as compared to twenty years for armed robbery.”

In *Leyra v. Denno* (1954) 347 U.S. 556, 74 S.Ct. 716, the Supreme Court, discussing a coerced confession which is analogous to a coerced plea, said:

“The New York Court of Appeals reversed on the ground that one of the confessions, made to a state-employed psychiatrist, had been extorted from petitioner by coercion and promises of leniency in violation of the Due Process Clause of the Fourteenth Amendment.

“The use in a state criminal trial of a defendant’s confession obtained by coercion — whether physical or mental — is forbidden by the Fourteenth Amendment.”

The terms “fear” or “hope” are the same thing, in effect, as “threat” or “promise” (III Wigmore on Evidence (3d Edition) §825). Modern usage generalizes by employing the term “inducement” to cover all modes of influence, such as promise, threat, duress, coercion, fear and hope (III Wigmore on Evidence (3d Edition) §824).

XI. An order dismissing a petition for a Writ of Habeas Corpus, without issuing an order to show cause or holding a hearing, is reviewable *de novo* on appeal.

In *Ex Parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 9, the Supreme Court said:

“Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari.”

In *Ex Parte Mitsuye Endo* (1944) 323 U.S. 305, 65 S.Ct. 208, the Supreme Court said:

“The fact that no respondent was ever served with process or appeared in the proceedings is not important.”

In *Hawk v. Olson* (1945) 326 U.S. 271, 66 S.Ct. 116, 117, the Supreme Court said:

“As no response was filed or evidence received in the district court, we, * * * in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, *examine for ourselves* whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree.” (Emphasis added)

In *Baker v. Ellis* (5 Cir., 1952) 194 F.2d 865:

“The District Court declined either to award the writ of habeas corpus or to enter a show cause order * * * It cannot be doubted that the judgment is such a final judicial determination of the case as is reviewable here on appeal.” (Cf. *Jimenez v. Jones* (1 Cir., 1952) 195 F.2d 159)

In *In re Del-Marmol* (9 Cir., 1955) 221 F.2d 565 :

“Movant is a federal prisoner and a certificate of probable cause to appeal is unnecessary. 28 U.S.C. §2253.”

In *United States v. Denno* (2 Cir., 1955) 221 F.2d 626 (Petition for habeas corpus was dismissed after oral argument) :

“Our power and obligation on this appeal would seem to follow the rule in civil causes. *Same is not to be rigidly confined since we are in as good a position as the lower court to make an over-all appraisal of the . . . record.*” (Emphasis added)

The records of the Alaska District Court are before this Court of Appeals on this appeal, the same as they were before the Washington District Court (R. 85, R. 102, 103).

XII. The guilt or innocence of the petition is not a proper subject for consideration in a Habeas Corpus proceeding.

In *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S.Ct. 265, the Supreme Court said :

“The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”

In *Ex Parte Quirin* (1942) 317 U.S. 1, 63 S.Ct. 1, 9, the Supreme Court said :

“We are not here concerned with any question of the guilt or innocence of prisoners.”

In *Richards v. Matthews* (U.S. Court of Appeals D.C., 1953) 207 F.2d 227 :

“We will not consider the guilt or innocence of the accused.”

XIII. Title 28 U.S.C.A. §2255 has no application to Territorial Courts since they are not Courts created by an act of Congress.

Appellant was indicted for violation of a Territorial law created by an act of the Alaska Legislature, *viz.*, A.C.L.A. §65-4-1, which law defines first degree murder. In the United States first degree murder is defined in Title 18 U.S.C.A. §1111. Appellant was adjudged guilty and committed by act of the District Court for the District of Alaska. That District Court was created by an act of the Alaska Legislature, *viz.*, A.C.L.A. §53-1-1.

The legislature of Alaska has the same powers that the legislatures of the various states have, except, that under the provisions of the Alaska Organic Act §20, Congress has the power to disapprove laws passed by the legislature of Alaska. Congress may not do that with state laws. However, if Congress does not disapprove a law it stands in full effect, and, even if Congress does disapprove a law, the same is valid from the time of its passage, until so disapproved (*Cf., Atchison, T. & S. F. R. Co. v. Sowers* (1909) 213 U.S. 55, 29 S.Ct. 397).

A statute of a territorial legislature, although identical in terms with a general act of Congress, is not a law of the United States. Where Congress has expressly reserved the power to annul, as well as approve, a territorial act, such territorial act is not made an act of Congress by its approval by Congress, either expressly or by acquiescence, or by its approval in part (86 C.J.S. 629, Territories §22).

Title 28 U.S.C.A. §2255 was intended only to change the forum for collateral attacks on convictions from the District Court with territorial jurisdiction of the petitioner to the District Court of sentencing. Section 2255 provides collateral attack on the exact same grounds as habeas corpus. Motion under §2255 is habeas corpus in the sentencing court.

Alaska habeas corpus is defined under A.C.L.A. (1949) §66-26-1 to §66-26-46. Habeas Corpus in Alaska was created by an act of the Alaska Territorial Legislature and is not the same Habeas Corpus as found under Title 28 U.S.C.A. §2241 to §2254, in the United States.

The Organic Act of the Territory of Alaska makes Alaska, in effect, a sovereign state, concerning matters of a local nature. Habeas Corpus in Alaska is not only local in nature, but it is different and separate from Habeas Corpus in the United States. The provision in §2255, which prescribes that the (District) Court shall not entertain a petition for a writ of Habeas Corpus, unless a motion to the sentencing court for the same relief is inadequate or ineffective, does not apply to Alaska territorial courts. The very provision that "An application for habeas corpus * * * shall not be entertained * * *," means an application for habeas corpus under Title 28 U.S.C.A. §2241 *et seq.*

Appellant cannot come in under the Alaska habeas corpus laws and petition a United States District Court for habeas corpus relief, because the Alaska laws do not confer that power to United States District Courts, and, likewise, Title 28 U.S.C.A. §2241 *et seq.*, confers

habeas corpus jurisdiction on United States District Courts and not on the District Courts of the Territory of Alaska, for they are not United States District Courts.

Section 2255 is only a change in procedure and procedural laws of the United States are not applicable to Alaska (cf. *Starlof et al. v. United States* (9 Cir., 1927) 20 F.2d 32; *United States v. Bell* (1953) 14 Alaska 142, 108 F.Supp. 777).

In *Miner's Bank v. State of Iowa* (1851) 12 Howard 1, the Supreme Court held (we quote headnote 2 which we find accurate) :

“Though by the fundamental law of a territory its legislation is to be subject to the disapproval of congress, yet till disapproved it is valid and operative; *it does not owe its effect to the action of congress thereon, so as to become an act of congress.*” (Emphasis added)

In *Mookini v. United States* (1938) 303 U.S. 201, 58 S.Ct. 543, the Supreme Court said :

“Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that *vesting* a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a ‘District Court of the United States.’ ” (Emphasis added)

In *Connella v. Haskell* (8 Cir., 1907) 158 Fed. 285, 287 :

“The acts of the Legislature of a territory are not laws of the United States. * * * [Citations] * * * A person imprisoned pursuant to a judgment of a court of a territory for the violation of a ter-

ritorial law, is not in custody 'under or by virtue of the authority of the United States.' The case is therefore to be regarded as not differing from one in which the imprisonment is by virtue of a judgment of a state court for a violation of a state law."

In *United States v. Farwell* (D.C., Alaska 3 Div., 1948) 76 F.Supp. 35, 40:

"Although Alaska is not a state it is an organized and incorporated territory, *Rasmussen v. United States*, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862, and its status is thus distinguished from that of possessions of the United States such as Puerto Rico, and, formerly, the Philippines. . . ."

In *United States v. Twelve Ermine Skins* (D.C. Alaska 3 Div., 1948) 78 F.Supp. 734:

"It is not possible to enter a judgment of forfeiture notwithstanding the verdict under our practice as I conceive it to be. That might be done under the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, but those rules are not in effect here."

In *Ex Parte Mulvaney* (U.S. Dist. Ct. Dist. Hawaii, 1949) 82 F.Supp. 743:

"Yet the sovereignty whose substantive law was allegedly transgressed was that of the Territory of Hawaii.

"The sovereignty offended alone has the power and right to prosecute the accused for the substantive offense of rape committed within its exclusive jurisdiction."

In *Jones v. United States* (9 Cir., 1949) 175 F.2d 544 (Headnote 2):

"In prosecution in the District Court for the

Territory of Alaska for murders, the Alaska law controlled.”

In *Ex Parte Krause* (Dist. Ct., W.D. Washington, N.D., 1915) 228 Fed. 547, 549, 551:

“By act of Congress the territory of Alaska, under the Constitution and laws of the United States, became an inchoate state, not yet admitted, but organized, with separate Legislature, under a territorial Governor and other officers appointed by the President by consent of the Senate. The legislative power extended to all rightful subjects pertaining to local self-government not inconsistent with the laws and Constitution of the United States. That Congress had in mind the different relation of the local laws of the territory and national laws with relation to extradition or removal, I think is made manifest by the provisions of the Alaska Criminal Code and the general provisions of Congress.

“The Compiled Laws of Alaska have no greater force than a law enacted by a territorial legislature, subject to congressional approval, and as such its provisions are not laws of the United States, and do not come within the cognizance of the United States courts * * * [Citations] * * * Chief Justice Marshall, in *United States v. Burr* (No. 14,694) 25 Fed. Cas. 188, says: ‘No man can be condemned * * * in the federal courts on a state law.’” (Cf. *U. S. v. Wright* (D.C. Hawaii, 1954) 15 F.R.D. 184)

In *U. S. v. Doo-noch-keen* (1905) 2 Alaska 624:

“The [Alaska] District Court acts in a dual capacity for the purpose, first, of administering the local laws under the Code, and, as such, is considered a territorial court, and, second, for the pur-

pose of administering the laws of the United States which may be applicable to the district, and which are federal laws as contradistinguished from the local laws."

In *U. S. v. North Pac. Wharves & Trading Co.* (1912) 4 Alaska 552 (headnote 1):

"Since March 3, 1909, the district court of Alaska is granted dual jurisdiction; that is the jurisdiction of an ordinary court of record to hear, try, and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States, as well as the jurisdiction of a district court of the United States exercising the jurisdiction of a circuit court of the United States."

The Court of Alaska sits in a dual capacity. It sits as a court to administer territorial laws and, by an act of Congress conferring jurisdiction, it also sits, when necessary, as a District Court to administer the laws of the United States. It may not be said from this, however, that the District Court of Alaska was created by an act of Congress. Congress has only granted Alaska District Courts United States jurisdiction when not locally inapplicable.

The law on this point is well settled, as shown by the following excerpt quoted from 39 Corpus Juris Secundum, Habeas Corpus, §66:

"A person imprisoned pursuant to a judgment of a court of a territory for the violation of a territorial law is not in custody under or by color of the authority of the United States within the statute * * * [28 U.S.C.A. §2241 is referred to] * * * authorizing the issuance of the writ by the federal

courts, but the proper federal court has power to grant a habeas corpus if the detention is in violation of the federal Constitution, or the laws or treaties of the United States.”

To hold that §2255 applies to Alaska, would be to hold that prisoners in Alaska under commitment of an Alaska District Court could not avail themselves of the Alaska habeas corpus law, unless a motion for the same relief sought, to the same court, was inadequate or ineffective. The Alaska Territorial Court is but one court, though the judges thereof sit in different places within the district (cf. *Hemmingson v. Libby McNeil & Libby* (D.C. Alaska, 1950) 89 F.Supp. 502). Appellant cannot petition for habeas corpus relief when he is without the territorial limits of Alaska.

Such a holding would have the effect of suspending the writ of habeas corpus in Alaska. Applying §2255 to Alaska, suspends a law that Congress did not make. That section may apply to some possessions, but not organized territories. Suppose the Alaska habeas corpus law was disapproved by Congress, and we held that §2255 was applicable to Alaska, and in a particular case it was inadequate and ineffective. Where, and to whom, does the Alaska prisoner go for relief? Congress has provided no other remedy. Title 28 U.S.C.A. §2241, *et seq.*, does not help.

XIV. If Title 28 U.S.C.A. §2255 applies to the District Court of the Territory of Alaska, such application would not have the effect of withholding jurisdiction from United States District Courts in Habeas Corpus proceedings involving Alaska prisoners when it is shown that §2255 is inadequate or ineffective.

Section 2255 is nothing more than habeas corpus in another forum under the name of "Motion," and whether it be called a collateral attack or a direct attack limited to collateral grounds is immaterial. The following cases show the courts have called in both. In either event, however, §2255 may not take the place of an appeal or writ of error and relief thereunder may be granted on collateral grounds only as is traditional in habeas corpus.

In *Birtch v. U. S.* (4 Cir., 1949) 173 F.2d 316, 317:

"It should be borne in mind that the purpose of the section was not to enlarge the class of attacks which may be made upon a judgment of conviction, but to provide that the attack must be made in the court where the sentence was imposed and not in some other court through resort to habeas corpus, unless it appears that the remedy by motion is inadequate."

In *Hurst v. U. S.* (10 Cir., 1949) 177 F.2d 894:

"It does not enlarge the class of attacks which may be made upon a judgment of conviction, but provides that the attack must be made in the court where the sentence was imposed and not in some other court through resort to habeas corpus, unless it appears that the remedy by motion is inadequate. It is limited to matters that may be raised by collateral attack."

In *Meyers v. Welch* (4 Cir., 1950) 179 F.2d 707, 708:

“... the prisoner has no right to relief by habeas corpus where there exists the right to relief under 28 U.S.C.A. Section 2255; and the fact that the motion has been denied does not give the right to resort to habeas corpus, even if the movant is entitled to relief, since the remedy in such case is by appeal. Only where the remedy by motion with appeal therefrom is inadequate or ineffective to test the legality of his detention may there be resort to habeas corpus.”

In *Davilman v. U. S.* (6 Cir., 1950) 180 F.2d 284, 286:

“Prisoners adjudged guilty of crime should understand that 28 U.S.C.A. Section 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., Section 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.”

In *Bruno v. U. S.* (U.S. Court of Appeals D.C., 1950) 180 F.2d 393, 395, the court says:

“We observe that the language of Sec. 2255 shows Congress intended the motion to vacate thereunder for use only when the original judgment sought to be corrected thereby is subject to collateral attack. The section permits the attack to be made at any time, regardless of the limitation of Rules 33, and provides ‘An appeal may be taken

to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.'

"We hold, therefore, that a motion made under Sec. 2255 is the beginning of a new proceeding, independent of that in which the judgment it attacks was entered."

In *Barrett v. Hunter* (10 Cir., 1950) 180 F.2d 510, 514:

"The grounds for a motion to vacate, under §2255, encompass all of the grounds that might be set up in an application for a writ of habeas corpus predicated upon facts that existed at or prior to the time of imposition of sentence.

"If the motion and the records and files of the case conclusively show that the prisoner is not entitled to any relief, the court is not required to entertain the motion.

"In conventional habeas corpus, the court is not required to issue the writ if, on the face of the petition, it appears that petitioner is not entitled to the writ, or if, from undisputed facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting the writ exists . . . "

In *Hudspeth v. U. S.* (6 Cir., 1950) 183 F.2d 68, 69:

"Moreover, §2255 of the Judicial Code provides a remedy co-extensive with habeas corpus and so errors of fact or law at the trial may not thereunder be raised if the court has jurisdiction. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under that section."

In *Hastings v. U. S.* (9 Cir., 1950) 184 F.2d 939:

“A proceeding under §2255 is intended as a substitute for habeas corpus. The contentions here urged would not be considered in habeas corpus proceeding.”

In *Crow v. U. S.* (9 Cir., 1950) 186 F.2d 704, 706:

“It was intended to provide a prisoner, in custody under sentence of a court established by an Act of Congress, an exclusive remedy for determining the legality of his detention in the court which imposed the sentence, where the matter could most readily and conveniently be heard, and to make the final determination with respect to the legality of such detention conclusive, except in cases where the remedy thus provided was inadequate or ineffective to test the legality of such detention.

“Section 2255 does not extend the class of attacks which may be made upon a judgment of conviction. It substituted a frontal for a collateral attack on any ground mentioned therein. It was not meant to broaden the scope of attack upon a judgment and sentence permissible under habeas corpus but rather to confine the relief, which before the adoption of this section might have been afforded in some other court through resort to habeas corpus, to the court where the sentence was imposed, unless it should appear that the remedy thereunder is inadequate or ineffective to test the legality of detention. The court’s jurisdiction thereunder is coextensive with the jurisdiction of the court passing upon an application for the writ.”

The case of *Hallowell v. Hunter* (10 Cir., 1951) 186 F.2d 873, also directly holds that Section 2255 is limited to matters that may be raised by collateral attack, *i.e.*, habeas corpus.

In *Smith v. United States* (U.S. Court of Appeals D.C., 1950) 187 F.2d 192, 195:

“We recently indicated that the scope of review on such attack is the same as in habeas corpus cases. * * * [Citation] * * * Section 2255 was enacted, as stated in the Reviser’s Notes, to provide ‘an expeditious remedy for correcting erroneous sentences without resort to habeas corpus.’”

In *Clough v. Hunter* (10 Cir., 1951) 191 F.2d 516, 518:

“We have held that Section 2255 was designed to supplant habeas corpus by affording the same relief in the sentencing court under Section 2255 and that a proceeding thereunder was conclusive save only in those cases where the remedy thereunder was inadequate and ineffective. . . . We have repeatedly held that the grounds that may be urged for relief by motion are the same as could be raised by habeas corpus.”

In *Taylor v. U. S.* (10 Cir., 1952) 193 F.2d 411, the court said at page 412:

“Although the proceeding is a direct attack upon the judgment, the rights granted under the statute are limited to those available on a collateral attack.”

In *U. S. v. Bradford* (2 Cir., 1952) 194 F.2d 197, 200:

“The section ‘was passed * * * to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction,’ and its ‘sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.’ Thus the section should be read as coextensive in substance with the writ, and as confined to amending the procedure. . . .”

In *Markham v. U. S.* (4 Cir., 1954) 215 F.2d 56:

“28 U.S.C. §2255, . . . is available only where the sentence is void or otherwise subject to collateral attack.”

In *United States v. Jonikas* (7 Cir., 1952) 197 F.2d 675, 676:

“The purpose of the proceeding provided for by U.S.C.A. §2255 is to give the prisoner a method for a direct attack on his sentence in the court in which he was tried and sentenced; but to attack the sentence successfully in such a proceeding the prisoner must have grounds which would support a collateral attack on the sentence.”

In *Risken v. U. S.* (8 Cir., 1952) 197 F.2d 959, 961:

“A motion to vacate a judgment is a collateral attack upon the judgment, and only such grounds may be urged as would be available in habeas corpus proceedings.”

In *Kreuter v. U. S.* (10 Cir., 1952) 201 F.2d 33, the court also holds that Section 2255 and habeas corpus are one and the same thing being different only as to forum.

In *Kellner v. Metcalf* (9 Cir., 1953) 201 F.2d 838, the court holds that §2255 and habeas corpus are both collateral attacks.

The *Hayman* case is the leading Supreme Court case on Section 2255. That case sets forth several reasons why Section 2255 was originally conceived and passed. In *United States v. Hayman* (1951) 342 U.S. 205, 72 S.Ct., 263, the Supreme Court said:

“The need for Section 2255 is best revealed by a review of the practical problems that had arisen in

the administration of the federal courts' habeas corpus jurisdiction.

"Nowhere in the history of Section 2255 do we find any purpose to impinge upon *prisoners' rights* of collateral attack upon their convictions. On the contrary, the *sole purpose* was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum." (Emphasis added)

Following this we find:

"The *very purpose* of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement." (Emphasis added)

Is "sole purpose" and "very purpose" the same thing? Under "sole purpose" we find that the prisoner's rights are supposed to be afforded him in another and more convenient forum. Under the "very purpose" we find that the court officials and government witnesses are afforded a more convenient forum. For whose convenience was Section 2255 passed? The prisoner's or the government's?

In the *Hayman* case we also find:

"In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing.

"Under the 1867 Act [Now incorporated in 28 U.S.C.A. §2241, *et seq.*], United States District Courts have jurisdiction to determine whether a prisoner has been deprived of liberty in violation of constitutional rights, although the proceedings

resulting in incarceration may be unassailable on the face of the record. Under that Act, a variety of allegations have been held to permit challenge of convictions on facts *dehors* the record.”

In *U. S. v. Morgan* (1954) 346 U.S. 502, 74 S.Ct. 247, 252, the Supreme Court said:

“In *United States v. Hayman* . . . we stated the purpose of §2255 was ‘to meet practical difficulties’ in the administration of federal habeas corpus jurisdiction. We added: ‘Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions.’ ”

In *United States v. Anselmi* (3 Cir., 1953) 207 F.2d 312, 314:

“He urges that Section 2255 . . . is unconstitutional . . . We do not agree. On the contrary, Section 2255 is a remedial statute, the purpose of which is to afford to a convicted Federal prisoner a remedy which is the substantial equivalent of the conventional Writ of Habeas Corpus, but in a more convenient forum, the original trial court. To limit the prisoner to this remedial, except when it is inadequate or ineffective to test the legality of his detention, as Section 2255 does, is not to suspend the Writ of Habeas Corpus.”

In *Oughton v. U. S.* (9 Cir., 1954) 215 F.2d 578:

“As stated by the Supreme Court the ‘sole purpose’ in enacting this section ‘was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.’ ”

In *U. S. v. Swope* (5 Cir., 1955) 219 F.2d 538:

“The United States, in short, citing many cases,

urges upon us that the grounds for which Sec. 2255 supplies a remedy are limited to those which may be asserted in a collateral attack upon a judgment, while all of the matters relied upon by petitioner in his motion are in the nature of newly-discovered evidence as to the use of alleged perjured evidence or of the alleged insufficiency of the evidence, none of which may be asserted in a collateral attack.

“We find ourselves in complete agreement with these views.”

There is not too much doubt (except in appellant's mind) about the constitutionality of Section 2255. It is well established that Section 2255, unless inadequate or ineffective, is the exclusive remedy for collateral attacks on convictions. This also means an appeal must be taken from a denial, and resort to habeas corpus cannot be had.

In *Smith v. Reid* (U.S. Court of Appeals D.C., 1951) 191 F.2d 491, the court held that failure to succeed under §2255 does not authorize habeas corpus.

In *Higgins v. Steele* (8 Cir., 1952) 195 F.2d 366, 368:

“Whatever doubts there may have been as to the validity of Section 2255 have now been put at rest by *U. S. v. Hayman*, 342 U.S. 205, 72 S.Ct. 253.”

In *Butler v. Looney* (10 Cir., 1955) 219 F.2d 146, 147:

“The purpose of proceedings under Section 2255 is to provide that an attack on a judgment which previously might have been made in habeas corpus proceedings, must be made by motion filed in the criminal case where the judgment was entered. Proceedings thereunder are conclusive unless the remedy by motion is inadequate and ineffective

* * * [citations] * * * Except in cases where the remedy is inadequate or ineffective, proceedings under Section 2255 are exclusive.”

In *Osborne v. Looney* (10 Cir., 1955) 221 F.2d 254:

“A judgment may be attacked only under Section 2255, unless it is shown that the remedy thereunder is inadequate and ineffective.”

In *Trice v. United States* (9 Cir., 1955) 218 F.2d 588, this court holds that an appeal must be taken from a denial of a motion under Section 2255 and that habeas corpus relief may not be sought in the place of appeal.

Other Court of Appeals cases holding that Section 2255 is the exclusive remedy for collateral attack are: *Jones v. Squier* (9 Cir., 1952) 195 F.2d 179; *Winhoven v. Swope* (9 Cir., 1952) 195 F.2d 181; *Booth v. United States* (9 Cir., 1952) 198 F.2d 991; *Bozell v. Welch* (4 Cir., 1953) 203 F.2d 711; *Mills v. Hunter* (10 Cir., 1953) 204 F.2d 468; *Whiting v. Hunter* (10 Cir., 1953) 204 F.2d 471; *Halloway v. Looney* (10 Cir., 1953) 207 F.2d 433; *Werntz v. Looney* (10 Cir., 1953) 208 F.2d 102; *United States v. Josey* (3 Cir., 1954) 210 F.2d 826; *Wright v. Looney* (10 Cir., 1954) 212 F.2d 186; *United States v. Davis* (3 Cir., 1954) 212 F.2d 681.

When Section 2255 is shown to be inadequate or ineffective habeas corpus is available. Only when there is no such showing or when relief under Section 2255 was denied will habeas corpus be withheld. Appellant has shown, by uncontroverted verified petition, that relief under Section 2255 has not been denied him and that it is inadequate and ineffective to test the legality of his detention.

In *Decatur v. Hiatt* (5 Cir., 1950) 184 F.2d 719:

"In his petition for habeas corpus for release from confinement, appellant alleged that he had applied by motion for relief under Sec. 2255, 28 U.S.C.A., but he did not show that he had prosecuted the motion with effect. Neither did he show that such remedy by motion was 'inadequate or ineffective to test the legality of his detention.' Notwithstanding this failure and the fact that the record showed that the motion under Sec. 2255 had been denied, the district judge entertained his petition, heard and considered his claim that he was entitled to release on habeas corpus because his plea of guilty had been induced by the threat that he would be prosecuted for making his escape from and assaulting officers unless he entered a plea of guilty.

"The hearing ended, the district judge, concluding that petitioner was not entitled to the relief prayed, denied his petition, and he has appealed.

"In view of the denial of appellant's motion for relief under Sec. 2255 and of the failure of the record to show that the remedy by motion was 'inadequate or ineffective to test the legality of his detention,' we could properly affirm the judgment without further inquiry. Since, however, the district judge did in fact entertain the petition, we have concluded to consider the appeal on its merits . . ."

In *Hallowell v. Hunter* (10 Cir., 1951) 186 F.2d 873, 874:

"We hold * * * that an application for a writ of habeas corpus * * * should not be entertained where the sentencing court denied the applicant relief under § 2255 and the applicant failed to allege facts in his application for the writ showing that

the remedy by motion under § 2255 was inadequate or ineffective to test the legality of applicant's detention."

In *Barnes v. Hunter* (10 Cir., 1951) 188 F.2d 86, 88:

"It is not the function of this court on an appeal from an order denying an application for a writ of habeas corpus to review the action of the sentencing court in denying a motion to vacate a sentence filed under § 2255, *supra*. Our sole inquiry with respect to the proceedings on such a motion is whether the applicant for the writ has shown that his remedy by motion under § 2255, *supra*, was inadequate or ineffective to test the legality of his detention."

In *Owens v. Hinds* (10 Cir., 1951) 189 F.2d 518, the court denied habeas corpus only because petitioner made no showing that § 2255 was inadequate or ineffective.

In *Voltz v. Steele* (8 Cir., 1951) 191 F.2d 811, the court's opinion is:

"The appellant is confined in the Medical Center for Federal Prisoners at Springfield, Missouri, under a sentence of imprisonment imposed by the United States District Court for the Northern District of Alabama. He filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri. His petition did not show that he had applied to the court which sentenced him for a vacation of his sentence, pursuant to Section 2255, Title 28, U.S.C. The District Court correctly ruled that it was not authorized to entertain the petition."

In *Wheatley v. Hunter* (10 Cir., 1951) 192 F.2d 376, the court's opinion is:

“This is an appeal from an order dismissing a writ of habeas corpus. The application wholly failed to allege that the petitioner had applied for relief under 28 U.S.C.A., Section 2255, or that the court which sentenced him had denied him relief under that section, and that remedy by motion under that section was inadequate or ineffective to test the legality of his detention. The order is affirmed.”

In *Duquesne v. Steele* (8 Cir., 1952) 197 F.2d 56:

“The appellant’s petition for a writ failed to show that he had applied to the court which sentenced him for the vacation of his sentence, under Section 2255, Title 28, U.S.C.A. It was upon this ground that his petition was denied by the District Court for the Western District of Missouri.”

In *Sorrentino v. Swope* (9 Cir., 1952) 198 F.2d 789, 790:

“The language of Section 2255 expressly provides that in a case where the procedure established by that section is ‘inadequate or ineffective’ the petitioner may then seek a writ of habeas corpus. The record does not indicate that a motion under Section 2255 would have been ‘inadequate or ineffective’.”

In *King v. United States* (10 Cir., 1954) 214 F.2d 712, we have an appeal from an order dismissing an application for a writ of habeas corpus, the court affirmed and said:

“King wholly failed to allege any facts showing that the remedy by motion under 28 U.S.C.A. § 2255 was inadequate or ineffective to test the legality of his detention.”

In *Butler v. Looney* (10 Cir., 1955) 219 F.2d 146:

“The purpose of proceedings under Section 2255 is to provide that an attack on a judgment which previously might have been made in habeas corpus proceedings, must be made by motion filed in the criminal case where the judgment was entered. Proceedings thereunder are conclusive unless the remedy by motion is inadequate and ineffective * * * [Citations] * * * Except in cases where the remedy is inadequate or ineffective proceedings under Section 2255 are exclusive * * * [citing cases]. In a habeas corpus proceeding, the sole function of the court is to determine whether the remedy by motion under Section 2255 is inadequate or ineffective * * *.”

In *Frisbie v. Collins* (1952) 342 U.S. 519, 72 S.Ct. 509, the Supreme Court cites *Darr v. Burford* (1950) 339 U.S. 200, 70 S.Ct. 587, on the problem of exhaustion of remedies, which is somewhat analogous (Cf. *United States v. Hayman* footnote 40) to a case where Section 2255 is involved, and says:

“‘this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals’.”

From *Barrett v. Hunter* (10 Cir., 1950) 180 F.2d 510, we quote Judge Huxman's dissenting opinion, which, to a large degree, expresses appellant's view in this particular case, if Section 2255 is held to apply to Alaska:

“In *Stidman v. Swope*, D.C., 82 F.Supp., 931 Chief Judge Denman granted an application for the writ without requiring compliance with Section 2255. No attempt will be made to quote from that opinion. It is sufficient to say that I am in accord with its philosophy. To square with the concept of due process, there must not only be a remedy but the remedy must also be speedy and effective. I have grave doubts whether Section 2255 can ever be an effective remedy, save in those cases in which the sentencing court is in the same jurisdiction with the institution of confinement.

“To illustrate: Suppose a person sentenced to Alcatraz from the Federal Court in the District of Florida, or to McNeil Island by a Texas court, or to Atlanta by a court in the State of Washington, seeks to challenge the validity of the sentence in the sentencing court. May we not take knowledge of the fact that it would impose an onerous burden to transport these prisoners thousands of miles back and forth from their place of service of sentence to the sentencing court, with attendant guards, in armored cars, etc. Would it be possible to accord to petitioner that speedy remedy to which he is entitled if the sentence, in fact, is void? Would he have an opportunity to confer with an attorney, appointed for him by the sentencing court, prior to the time of trial to prepare his case, or to subpoena and interview witnesses? It seems to me the answer is obvious.

“The end sought to be accomplished does not justify the means unless it squares with the judicial concept and accords with constitutional requirements * * *

“Section 2255 is not free from ambiguity. This would appear not only from the language itself

but also from the fact that already judges skilled in law have reached conflicting conclusions. Thus the language that ‘an application for a writ of habeas corpus * * * shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him * * *,’ would seem to support a construction that compliance was a prerequisite and not a substitute for habeas corpus. It may be that the remaining language warrants a construction that it is the exclusive remedy other than in cases in which the remedy by motion is inadequate or insufficient—whatever that means—to test the legality of the detention.”

In *United States v. Handy* (1955) 130 F.Supp. 270, 273:

“Has the applicant met the burden of showing that he has exhausted the remedies available * * * ? Respondent argues that the Pennsylvania Supreme Court did not directly meet and dispose of the question of hysteria and prejudice.

“A remedy may be exhausted by affirmative use thereof and failure therein or by inaction or failure to resort thereto.”

The Washington District Court in its first order of dismissal indicated that appellant’s route of relief from the inaction of the Alaska court was by appeal (R. 91). This route, however, was not open to appellant (Cf. *Kellner v. Metcalf* (9 Cir., 1953) 201 F.2d 838).

In its second order of dismissal the Washington District Court suggested that appellant’s remedy was by writ of mandamus directed to the Alaska court (R. 98). Such burden, if upheld, renders § 2255 unconstitutional.

If § 2255 is habeas corpus in another forum, it must afford the same relief. It must be adequate to cover all forms of collateral attacks traditional to habeas corpus. It must be effective with the same rapidity as is traditional to habeas corpus. Many times there will be more delay than would be caused by habeas corpus. Such delays are to be expected because of the great distances prisoners very often are from the sentencing courts. However, when the speedy relief of § 2255 is delayed for some reason other than the normal procedural delays incident thereto, it becomes inadequate as a speedy remedy and habeas corpus should be allowed. Our individual citizens are all alike in that they have but one life to live. Our laws are not designed to imprison them without affording them due process and upholding their constitutional rights, and when they are imprisoned and claim they have been denied these fundamental guarantees our laws are designed to allow them a speedy hearing to determine the true facts.

The following language from *Johnston v. Zerbst* (1938) 304 U.S. 458, 58 S.Ct. 1019, 1025, is highly appropriate in this case so far as appellant's contentions are concerned:

"If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by habeas corpus * * * * To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."

CONCLUSION

It is respectfully submitted, that this court should examine the allegations of the petition in this proceeding and compare them with the Alaska court's records. Many allegations *dehors* the record and are sufficient to raise serious questions. Others are borne out by the record and patently show that due process has been denied in this case. The order of the United States District Court for the Western District of Washington, Northern Division, heretofore entered on the 26th day of May, 1955, should be reversed.

Respectfully submitted,

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IN THE
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Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff
of Skagit County, Washington;
WILLIAM B. PARSONS, United
States Marshal for the Western
District of Washington; and
Honorable HERBERT BROWNELL,
Attorney General of the United States,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

This action was brought in the District Court for the Western District of Washington under 28 U.S.C. 2241. Appellate jurisdiction lies in this court under 28 U.S.C. 2253.

II. STATUTE INVOLVED

28 U.S.C. 2255 (62 Stat. 967, as amended by 63 Stat. 105) states, in part, as follows:

“A prisoner in custody under sentence of a court *established by Act of Congress* [italics portion substituted for 62 Stat. 967 which read “* * * of the United States. * * *”] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the [sentencing] court to vacate, set aside or correct the sentence.

* * * *

An appeal may be taken to the court of appeals from the order * * * as from a final judgment on * * * habeas corpus.

* * * *

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the [sentencing] court * * * or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

III. QUESTIONS PRESENTED

1. Did the District Court for the Western District of Washington ever rule on the merits of appellant's petition?

2. Do the quoted portions of 28 U.S.C. 2255 require appellant to pursue his remedial action in the District Court for the District of Alaska and simultaneously deprive the District Court for the Western District of Washington of 28 U.S.C. 2241 jurisdiction?

3. Is the entire matter moot?

IV. STATEMENT OF THE CASE

Pursuant to Rule 18-3 of this court, appellee waives controversion of appellant's statement of the case.

V. SPECIFICATION OF ERROR

Appellee, at the outset, feels that the issue must be clearly delineated. Appellant states (Tr. 10, line 24) "After considering the same [appellant's petition] on the merits, the * * * Court * * * erred in dismissing * * * Petition. * * *" Appellee contends that the District Court never passed on the merits and the sole appellate question ~~in~~ jurisdiction.

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VI. SUMMARY OF ARGUMENT

Much of appellant's brief, specifically grounds V (Brief, p. 26, VI (Brief, p. 27), VII (Brief, p. 35), VIII (Brief, p. 37), IX (Brief, p. 39) and X (Brief, p. 40) deal with the merits of appellant's petition

which were never considered by the District Court. Many of the cases cited and arguments made would, no doubt, be pertinent were this appeal on the merits. However, it is not.

Appellant's grounds I (Brief, p. 11), II (Brief, p. 12), III (Brief, p. 20), IV (Brief, p. 25) and XII (Brief, p. 43) might be called "procedural" aspects of habeas corpus and would doubtless be pertinent were this appeal on the merits. However, it is not.

Appellee contends that appellant's ground XI (Brief, p. 42) does not correctly state the law and that the cases cited do not support the proposition stated. Appellee further contends that such statement, were it the law, would apply only to an appeal on the merits which is not before the court.

Appellee contends that 28 U.S.C. 2255 does apply to the District Court for the District of Alaska and that such court was created by an Act of Congress (Appellant's Brief, ground XIII, p. 44).

Appellee contends that 28 U.S.C. 2255 has not been shown inadequate or ineffective and hence 28 U.S.C. 2241 can have no application.

Appellee contends that the entire issue is now moot inasmuch as appellant is beyond the jurisdiction; the parties to the action no longer control the appel-

lant's custody; and the issue of Judge Folta's alleged prejudice has vanished with his death.

VII. ARGUMENT

A. *The Appeal Before the Court Is on Jurisdictional Grounds—Not on the Merits.*

The District Court did state (Tr. 96, line 22) “* * * it appears advisable to consider said motion and amended petition *on its merits*” [italics supplied] but the words must be read in context. The District Court had first said (Tr. 86, line 11) “The sole issue before the Court is one of jurisdiction * * *” and had ruled (Tr. 92, line 1) “* * * this court does not have jurisdiction.”

The District Court, when passing on the amended petition, said (Tr. 96, line 22), “* * * The amended petition contains no additional allegations of fact that * * * give this court *jurisdiction* [italics supplied] and the [previous] decision [denying jurisdiction] * * * is affirmed.

Clearly the use of the word “merits” by the District Court was to indicate a re-examination of the *jurisdictional* claim as distinguished from summary disposition of the matter as *res judicata*; the District Court never considered the matter on the merits; and the only appellate question is jurisdictional.

B. Appeal on Jurisdiction Does Not Permit a Review de novo on the Merits.

Since there has been no District Court decision on the merits, a review *de novo* on the merits would be an anomaly. However, from appellant's ground XI (Brief, p. 42) it is not entirely clear to appellee what is sought from the Court of Appeals.

Appellant cannot be seeking an original writ of habeas corpus from the Court of Appeals for that court will not issue one. *Moore v. Smith* (C.A., 9th; 1947) 164 F. 2d 483.

Appellant cannot be seeking a writ of habeas corpus from "* * * any circuit judge within [his] * * * jurisdiction" under 28 U.S.C. 2241. This is an appellate, not an original proceeding. See *Bowen v. Johnston* (D.C. Cal., 1944) 55 F. Supp. 340.

Cases cited in support of appellant's desire to have the Court of Appeals decide the matter *de novo* do not appear to be in point. This is an appeal from a District Court's decision that it had no jurisdiction; not a decision on the merits.

Specifically, the *Endo*, *Hawk*, *Ellis* and *Denno* cases were reviews on the merits from denials on the merits by lower courts and are not in point here.

The *Quirin* case cited by appellant in support of his proposition for a review on the merits here is the only one remotely in point. In that case a District Judge (*Ex parte Quirin*, (D.C., Dist. Col., 1942) 47 F. Supp. 431) had denied a petition for habeas corpus on the ground that petitioners were not privileged to seek the same, being excluded from U. S. courts by Presidential proclamation. In that respect, it resembles this case in that jurisdiction — not merit — was denied. The Supreme Court did go extensively into the merits of the matter but it must be remembered that the German saboteurs were *sui generis*. It must also be remembered that (317 U.S. at 18) the Supreme Court was actually considering in parallel an application for leave to file an original petition in the Supreme Court and a review of the adverse decision of the District Court. A peculiar state of facts was thereby presented. This case cannot be cited as authority for review on the merits of a denial of the writ on alleged lack of jurisdiction. Appellee knows of no case, nor has he been cited to any, holding that a refusal to hear on jurisdictional grounds may be appealed on the merits.

C. 28 U.S.C. 2255 Does Apply to the District Court for the District of Alaska and Such Court was Created by Act of Congress.

Appellant states in his Section XIII (Brief, p. 44) that 28 U.S.C. 2255 does not apply to the court in which the defendant was tried or to the crime for which defendant stands committed. Appellee feels that appellant errs in his conclusion and in the premises upon which it is based.

First degree murder was neither created nor defined by the Alaska legislature. That was done by the Act of March 3, 1899 (30 Stat. 1253) which enacted a criminal code and one of criminal procedure for Alaska. Similarly, the District Court was not created by the Alaskan legislature, but by the Act of June 6, 1900 (31 Stat. 321 at 322; 48 U.S.C. 101). Both statutes are printed in ACL (65-4-1 and 53-1-1, respectively) but this is by virtue of Chapter 28, Alaskan Laws of 1947 (ACL, Vol. I, p. xi) which provides for the compilation, *inter alia*, of “* * * the laws of the United States exclusively applicable to this Territory * * *” — *not* because they are acts of the territorial legislature.

Appellee is willing to concede appellant's statements (Brief p. 45) that the Alaskan territorial legislature has reasonably broad legislative powers and

that territorial statutes, although identical in form are not acts of Congress. However, appellant's arguments are not in point. Appellee points out the distinction between Acts of Congress in effect in Alaska and laws passed by the Territorial Legislature, See *U. S. v. Wigger*, 235 U.S. 276, 35 S.Ct. 42, 59 L.Ed. 226 (1914). The simple fact in this case is that the Alaska legislature has neither passed any law concerning murder nor has it created the District Court.

That so-called Alaskan habeas corpus noted on page 45 of appellant's brief is not the same as 28 U.S.C. 2241 *et seq* cannot be gainsaid for plainly the language differs. But, Alaskan habeas corpus is not a creation of the Alaska legislature having been established by the Act of June 6, 1900 (31 Stat. 321 at 423). ACL Nos. 66-26-20 to ACL 66-26-22 inclusive have been interpolated between Sections 584-585 of the statute by Chapter 64 of the Alaska session laws of 1925 and such source is plainly indicated in the historical notes in ACLA. The remainder is and remains the original Congressional enactment. Whether the Alaskan legislature *could* pass a different law is not material. The fact remains that it has not done so.

The fundamental questions to be here decided are whether (a) 28 U.S.C. 2255 applies to the Alaska District Court, and (b) if it apply, does it simul-

taneously deprive the Washington District Court of habeas corpus jurisdiction.

Appellant's cited cases on pages 46-50 appear to be devoted to two contentions, as follows:

- (a) That territorial laws are not laws of the United States.
- (b) That the Alaska District Court is not a District Court of the United States.

A careful reading of 28 U.S.C. 2255 will show clearly that if both of appellant's contentions be true, it is completely immaterial. The section of the United States Code cited speaks of prisoners under sentence " * * * of a court established by Act of Congress. * * *"

The code section does not say (as it did until 1949) "a court of the United States." Appellee concedes that under that wording some question might arise but Congress clarified the matter by the 1949 amendment (63 Stat. 105). See Footnote 1, page 682 to *U. S. ex rel Leguillou v. Davis* (C.A., 3rd; 1954) 212 F. 2d 681 quoting Senate Report 303 explaining the purpose of the 1949 amendment to "make it clear that the section is applicable in the district courts in the territories and possessions."

The sole question remaining is, whether the Alaska District Court was established by Act of Con-

gress and the answer must, of course, be affirmative. Otherwise, the court would not exist.

Having established the Alaska District Court as a "court established by Act of Congress," it necessarily follows that 28 U.S.C. 2255 applies to a prisoner under sentence of that court if his claimed grounds for relief fall within the provisions of such act. An examination of all the files and records in this case shows clearly that petitioner's claimed grievances *do* fall within the purview of the statute. It is clear, then, that such petitioner "may move" the sentencing court for relief. The next question is "must he?" and the reciprocal question also opens, to-wit: if 28 U.S.C. 2255 applies, has any other court the power to hear him?

The habeas corpus power of the United States courts is statutory. *Ex parte Bollman*, 4 Cranch. 72, 2 L.Ed. 554 (1807). Congress has expanded the rights of a petitioner for habeas corpus. *Johnson v. Zerbst*, 304 U.S. 458 at 466, 58 S.Ct. 1019, 82 L.Ed. 1089 (1937). It follows therefore that power granted or enlarged by Congress can be limited or withdrawn by Congress. The existing habeas corpus law (62 Stat. 967) was passed by Congress on June 25, 1948 and included both 28 U.S.C. 2241 *et seq.*, and 28 U.S.C.

2255 here in controversy. Congress obviously intended to and did withhold from the district court power granted by 28 U.S.C. 2241, the power reserved to the sentencing court in 28 U.S.C. 2255.

Necessarily then the District Court for the Western District of Washington has no power or jurisdiction to hear the petitioner unless the remedy under 28 U.S.C. 2255 be "inadequate" or "ineffective" as contended by appellant in Argument XIV.

D. 28 U.S.C. 2255 Has Not Been Shown Inadequate or Ineffective.

Appellant in Argument XIV (Brief, p. 51) states that habeas corpus in the Western District of Washington is available to petitioner under the law if 28 U.S.C. 2255 be inadequate or ineffective. Appellee does not quarrel with the plain wording of the statute.

Appellant states (Brief, p. 60, line 27) "Appellant has shown * * * that it [2255] is inadequate and ineffective to test the legality of his detention." With the word "shown" (as synonymous with "proved") we cannot agree. In Bouvier's Law Dictionary we find "show" defined as "to make apparent or clear by evidence, to prove" and this, rather than the meaning of "represent" or "allege" is the one which we feel must be applied.

Beginning with the cases cited by appellant in his brief on page 61, *et seq*, we find that the *Decatur*, *Hallowell*, *Owens*, *Voltz*, *Wheatley*, *Duquesne* and *King* cases are nothing more than statements that habeas corpus should not be entertained absent certain averments re 2255 required by statute. But the converse (*i.e.* that the application *must* be entertained if the statutory allegation be made) is by no means correct.

The *Barnes*, *Sorrento* and *Butler* cases cited go only to support the action of the District Court. The allegation of inadequacy and ineffectiveness having been made, the District Court evaluated it, found against the petitioner and, as a result, denied jurisdiction. That was all that it was required to do.

Appellant in his brief (page 66, line 25) misquotes the District Court when he says “* * * appellant’s route of relief * * * was by appeal.” What the District Court said (Tr. 91, line 27) was: “* * * relief must be sought before the court of appeals and not here,” quite a different matter. The *Kellner* citation is not in point.

Appellant claims in concluding his brief that a writ of mandamus from this court to the Alaska court directing action, upon the 2255 petition (Brief, p. 66, line 31) would be a cumbersome procedure. This court

has used such power *U. S. v. Hall*, (C.A., 9th; 1944), 145 F. 2d 781 and there is no reason to believe that it would have failed to do so in this instance.

In treating of the factual inadequacy or ineffectiveness of 28 U.S.C. 2255 in terms of compliance with the statute, appellee feels that he cannot improve on *U. S. ex rel Leguillou v. Davis* (C.A., 3rd; 1954) 212 F. 2d 681 at 683:

“But the remedy is not made thus ‘inadequate or ineffective’ by doubts about its administration in a particular case. Even if a district court should incorrectly dispose of [refuse to hear] a proper motion under Section 2255, the remedy would be by appeal [mandamus] and not any alternative habeas corpus petition. * * * Indeed, we think the * * * motion can be ‘inadequate or ineffective * * *’ *only if it can be shown that some limitation of scope or procedure* [italics supplied] would prevent a Section 2255 proceeding from affording * * * [relief].”

It is further interesting to note that the Third Circuit observed, “It is understandable that it may have seemed desirable to submit the issues of this petition to a judge who was a stranger to the controversy,” but concluded, nevertheless, that 2255 procedure was mandatory.

E. The Issue Is Moot.

The court will discover from the stipulation on file herein that appellant is no longer within the West-

ern District of Washington but is incarcerated at the Federal Reformatory at ^{E'}91 Reno, Oklahoma. That being so, it follows that this cause is moot as 28 U.S.C. 2241, the statute under which the petition was brought, authorizes the granting of the writ by "* * * the district courts and any circuit judge within their respective jurisdictions." See *U. S. ex rel Keefe v. Dulles* (C.A., Dist. Col.; 1955) 222 F. 2d 390.

There are cases which appear to hold that a transfer of petitioner will not defeat jurisdiction but a careful examination of cases cited in Petitioner's First Memorandum of Authorities, page 2, submitted to the District Court, reveals that they are clearly distinguishable.

In *Ex parte Catanzaro*, (C.A., 3rd; 1943) 138 F. 2d 100 the Third Circuit refused to dismiss a similar petition saying "There is nothing in the record to indicate that he is still not within the custody of the United States Marshal" although it has been suggested to the Court that the prisoner was confined at a penitentiary outside the District. Such is not the case here.

In *Passic v. State*, (D.C. Mich., 1951) 98 F. Supp. 1015, the District Judge cited the *Catanzaro* case and stated that the transfer of a state prisoner to a state hospital in another district of Michigan (at 1016)

“* * * cannot defeat a court’s jurisdiction to grant or refuse writ on merits of application.” But after so stating the District Judge cited 28 U.S.C. 1406(a) which provides for dismissal, or *transfer* to the proper district, and then dismissed the petition. Again, we must conclude that the Court was indulging in *dictum*.

The Supreme Court has examined the question in *Ex parte Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944) from the dual standpoint of physical location of the prisoner and the amenability of her custodians to the court in question (which will be treated *infra*). After noting (at 304) that the petitioner was no longer within the District or Circuit, the Court said:

“Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of the appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior that if the writ issues * * * the corpus of appellant will be produced and the court’s order complied with in all respects. *Thus* [italics supplied] it would seem that the case is not moot.”

The appellant is clearly not within the jurisdiction of the District Court. Reversal of the District Court’s decision, remand, reconsideration, and a decision to issue the writ would all be worthless as nothing would thereby be accomplished.

It is likewise clear from the stipulation on file herein that the appellant is no longer under any restraint imposed by Harold H. Hinshaw and William B. Parsons, Respondents, they being respectively the sheriff having control of the county jail where appellant was confined in the Western District of Washington and the United States Marshal for said district under whose general control he was confined. As to these two persons, the reasoning of the Supreme Court in *U. S. ex rel Innes v. Crystal*, 319 U. S. 755, 63 S.Ct. 1321, 87 L.Ed. 1694 (1942), as noted in the *Endo* opinion, *supra* (at 305) applies:

“Only an order directed to the warden of the penitentiary could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot.”

Only one person named in the original proceeding, Herbert Brownell, Attorney General, exercises (through the Bureau of Prisons) any control over the prisoner. Since he was never served in this action and has not consented to the jurisdiction, manifestly no order of this or the District Court can apply to him. He is not a party to the proceeding. *Cf. Mora v. Brownell*, No. 14,454 decided by this court on December 9, 1955. The case is moot because those who were made parties to the action no longer have custody of

the prisoner; those who have custody were never made parties to the action.

Appellee further contends that any alleged prejudice of Honorable George W. Folta, District Judge, can no longer affect a 2255 proceedings. The judge in question, as appears from the stipulation on file herein, has been dead since June 6, 1955.

VIII. CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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United States Attorney

EDWARD J. McCORMICK, JR.
Assistant United States Attorney

United States Court of Appeals
For the Ninth Circuit

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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United States Court of Appeals

For the Ninth Circuit

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United States Court of Appeals

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SONS, United States Marshal for the
Western District of Washington; and
Honorable HERBERT BROWNELL, Attor-
ney General of the United States,
Appellees.

No. 14833

APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

I. FACTS IN APPELLANT'S BRIEF ARE TRUE

The United States Court of Appeals for the Ninth Circuit, Rule 18-3, concerning the appellees' brief, provides:

"His brief shall be of like character with that required of the appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the appellant is controverted."

Appellees have waived "controversion of appellant's statement of the case" (Appellees' brief, page 3). Therefore, appellant's statement of the case, as it appears on pages 3 through 10 of his opening brief, should be accepted as telling the full, accurate and complete story of his unlawful commitment, and of appellant's futile attempts to obtain judicial relief therefrom.

II. PETITION WAS CONSIDERED ON MERITS

Appellees contend that the District Court for the Western District of Washington never ruled on the merits of appellant's amended petition. The District Court's order, which forms the basis of this appeal, reads *inter alia* as follows:

"Passing the question of whether petitioner's 'Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus' is properly before the court, inasmuch as petitioner has indicated he will seek relief from a higher court if he is denied a hearing on his petition, it appears advisable to consider said motion and amended petition on its merits."

The District Court then, in the next two paragraphs, said:

"Paragraph I of the amended petition incorporates by reference the original petition."

"Paragraph II alleges the sufficiency of the original petition."

From this we can properly assume that the District Court did consider the merits of the amended petition. These words mean just what they say. In other words, that the District Court did consider the merits. With nothing more than the printed opinion, what light gives appellees the insight to determine or claim that the District Court, in fact, did not consider the merits in arriving at its decision? The fact that the District Court considered the merits is not open to question, unless we completely disregard the Court's own words.

III. APPELLANT IS CONFINED IN OKLAHOMA

Appellant was secretly and in violation of a rule of this Court (Rule 27, *infra*) transferred from within the territorial jurisdiction of the District Court for the Western District of Washington. He was not allowed to contact his counsel before his departure, and his counsel were not otherwise advised of his departure. On May 15, 1955, appellant wrote the following letter to his attorneys:

“May 15, 1955

“Dear Mr. Simmons,

“I am now in the County Jail in Portland. Early yesterday morning the Marshall came to Mt. Vernon and hurried me down here. I asked him if you had been notified of my being moved and he said it was against regulations to notify anyone when a prisoner is being moved. I am supposed to leave here tomorrow en route to El Reno.

“I would appreciate it if you would send a letter to El Reno telling me just what the score is because I’m kinda mixed up about things cause everything happened so fast I didn’t have anytime to prepare myself for it. Hoping to get straightened out soon.

“Sincerely yours,

/s/ KENNETH MADSEN”

This letter, dated May 15, 1955, was postmarked at Portland May 18, 1955, and received May 19, 1955, by appellant’s attorneys, in Seattle.

Appellant is now in custody in the Federal Reformatory at El Reno, Oklahoma. He therefore is presently confined outside the territorial jurisdiction of the District Court for the Western District of Washington.

At the time appellant filed his amended petition, however (May 10, 1955), he was within the territorial jurisdiction of the District Court (R. 92-95). The order of the District Court for the Western District of Washington, Northern Division, which forms the basis of this appeal, was rendered on May 25, 1955, and was filed the following day (R. 99). This was eleven days after appellant's removal from within the territorial jurisdiction. The District Court was fully apprised, in open court, on May 20, 1955, five days before rendition of its order, that the appellant was no longer within its territorial jurisdiction.

IV. APPELLEES HAVE MADE GENERAL APPEARANCE

Appellees urge upon this Court that it has no jurisdiction over any person capable of enforcing any order it might render in this cause. But that is not the fact. This Court not only has jurisdiction over the person of an individual to give force and effect to its orders in this case, but it also has the inherent power, absent that, to order appellant returned to Washington, in order to give effect to its mandates.

In appellees' brief, page 17, we find the statement that Herbert Brownell "exercises (through the Bureau of Prisons) some control over appellant." In the transcript of record, pages 23 and 24, we find:

"It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty-five (25) Years."

It is obvious that Herbert Brownell not only has con-

trol over appellant's place of confinement, but also personally or through his agent also actual custody. Appellant's imprisonment is invalid if he is not held under and pursuant to the judgment and commitment of the Alaska Court, which specifically commits him to the "custody of the Attorney General or his authorized representative."

On examination of the records in this Court we find, *inter alia*, the following, which conclusively shows appellees have made a general appearance:

1. Stipulation, dated November 18, 1955, approving appellant's motion, signed by Edward J. McCormick, Jr., "of counsel for appellees . . . "

2. Order, entered on or about November 21, 1955, "approved for entry" by Edward J. McCormick, Jr.

3. Stipulation, dated December 1, 1955, approving appellant's motion, signed by Edward J. McCormick, Jr., "of counsel for appellees . . . "

4. Order, entered on or about December 2, 1955, "approved for entry" by Edward J. McCormick, Jr.

5. Request that appeal be heard in Seattle or Portland, which is signed under "copy received" by Edward J. McCormick, Jr., "assistant United States Attorney and one of the attorneys of record of appellees."

6. Acknowledgment of service, signed by Edward J. McCormick, Jr., Assistant United States Attorney, which reads:

"I, the undersigned, Edward J. McCormick, Jr., one of the attorneys of record for the above named appellees, do hereby acknowledge that on the 8th day of December, 1955, I was duly and regularly

served with three copies of the appellant's opening brief in the above cause."

7. Motion, Stipulation and Affidavit of Appellees' attorneys for continuance. In the stipulation, under date of January 4, 1956, we find:

"It is hereby stipulated and agreed by and between Edward J. McCormick, Jr., Assistant United States Attorney, of counsel for appellees and . . ."

In the affidavit of Edward J. McCormick, Jr., attached thereto, under date of January 3, 1956, we find:

"That he is one of the appellees' attorneys; that he is familiar with the problems and issues raised by this appeal; that he has been diligently working on appellees' brief herein, and finds that in order to properly prepare and present what he considers a good and complete brief, he will need additional time of at least one week for preparation; that the appellant is now serving a twenty-five-year sentence, the validity of which may stand or fall on the contents of the brief; that it is not possible, even by continual study, to adequately prepare, print and serve a good brief on behalf of appellees by January 7, 1956.

/s/ EDWARD J. MCCORMICK, JR."

8. Order, entered on or about January 4, 1956, and presented by Edward J. McCormick, Jr., as "Assistant United States Attorney of Attorneys for Appellees."

9. Stipulation to facts prepared by appellees' counsel, Edward J. McCormick, Jr., under date of January 3, 1956, reading, *inter alia*, that:

"IT IS HEREBY STIPULATED AND AGREED by and be-

tween counsel for appellant and counsel for appellees in the above-entitled cause, the following facts are true: . . . ”

This stipulation is signed by Edward J. McCormick, Jr., “Assistant United States Attorney of Counsel for Appellees.”

10. Brief, of appellees, prepared and submitted by Charles P. Moriarity, United States Attorney, and Edward J. McCormick, Jr., Assistant United States Attorney.

In the rules of the United States Court of Appeals for the Ninth Circuit under Rules 18-9, we find, *inter alia*, that:

“A brief of an *amicus curiae* may be filed only after order of the court or when accompanied by written consent of all parties to the case.”

From the record we readily discern that no special appearance has been made herein, nor was appellees’ brief filed as a mere *amicus curiae* brief. It is clear that the Attorney General has made a general appearance in this case and that this Court has jurisdiction over his person. Appellees have made no special appearance, on the contrary, they have acted completely under a general appearance throughout (*Cf.*, *Standish v. Gold Creek Mining Co.* (9 Cir., 1937) 92 F.2d 662; 6 C.J.S. Appearance p. 47, §17a; 3 Am. Jur. Appearances p. 783, §3 and p. 794, §20).

V. THE CASE IS NOT MOOT

Appellees’ general appearance prevents this case from being moot. In *Ex Parte Mitsuye Endo* (1944) 323 U.S. 309, 65 S.Ct. 208, 220, the Supreme Court said:

“The fact that no respondent was ever served with process or appeared in the proceedings is not important.

“The statute upon which the jurisdiction of the District Court in habeas corpus proceedings rests . . . gives it power ‘to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.’ That objective may be in no way impaired by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court’s process even though the prisoner has been removed from the district since the suit was begun.”

In *Orloff v. Willoughy*, 72 S.Ct. 998 (1952), Judge Douglas declared that the problem presented was protection of jurisdiction:

“ . . . the Commanding Officer of Fort Lawton can recall and produce Orloff [petitioner] in response to an order of the District Court for the Western District of Washington . . . no matter to what army post Orloff is assigned . . . In view of the control over Orloff which the Commanding Officer of Fort Lawton has by reason of Orloff’s ‘detached service status,’ the jurisdiction of this Court over the appellate proceedings would not be disturbed if Orloff were moved to another army post within the United States.”

However, even absent the appellees’ general appearance, this Court has full jurisdiction. In *Ex Parte Catanzaro* (3 Cir., 1943) 138 F.2d 100 (Certiorari denied 64 S.Ct. 789), the court, after recognizing the proposition that it would not decide a moot point, said

there was nothing in the record to indicate that petitioner had been removed from the jurisdiction, but presumably, even if there had been, the court said:

“Furthermore, we do not believe that passing about the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can defeat the jurisdiction of the Court to grant or refuse the writ on the merits of the application. It is a general rule of law that where one has become subject to the jurisdiction of a court, the jurisdiction continues in all proceedings arising out of the litigation such as appeals and writs of error. . . . [Court then points out Court Rule that custody shall not be disturbed pending appeal] . . . The only way the Marshal could explain an inability to produce the petitioner in response to the writ, if issued, would be set up a violation of the rule of this Court, which might serve as a confession, but hardly an avoidance. We think it clear that whatever may be the rights the petitioner has through his application for a writ of habeas corpus, they are not lost by whatever may have been done to him between his application and the decision of his case on appeal.”

In the rules of the United States Court of Appeals for the Ninth Circuit, Rule 27, we find:

“Pending an appeal from the final decision of any Court or Judge declining to grant a Writ of Habeas Corpus, the custody of the prisoner shall not be disturbed.”

In *U. S. v. Neeley* (U.S.D.Ct. N.D. Illinois E.D., 1953) 115 F.Supp. 615, Judge Campbell held:

“Upon the basis of these findings, the court concludes as a matter of law that jurisdiction over re-

lator's person was acquired on September 14, 1953, at 12:05 P.M. At that time, counsel for relator filed the petition for the writ; at that time, relator was detained by agents of the respondent within this district; and at that time, respondent knew that this proceeding would be instituted. These are the facts which compel the court to find that jurisdiction was acquired.

"The court is pleased that the Department of Justice chose to obey the writ issued on September 14, by producing relator before the court, for voluntary obedience has obviated the need to call upon the inherent power of this court to compel obedience to its lawful process. But if the Department chose not to obey the writ, this proceeding would not have been invalidated. Jurisdiction in this matter, once acquired, is retained, *Ex Parte Mitsuye Endo*, 1944, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243; and the court could have passed upon the merits of this case in the absence of the relator. See, for example, *Ex Parte Catanzaro*, 3 Cir., 1943, 138 F. 2d 100, 101, wherein the court stated: ' * * * we do not believe that passing about of the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can defeat the jurisdiction of the court to grant or refuse the writ on the merits of the application.' An able opinion by Judge Holtzoff expresses a similar view. *Ex parte Flick*, D.C., 1948, 76 F.Supp. 979."

In *U. S. v. Sahli* (7 Cir., 1954) 216 F.2d 33, the court said, in affirming the *Neeley* case:

"On this appeal the relator states that the United States District Court for the Northern District of Illinois had jurisdiction to issue the writ of habeas corpus on September 14, 1953, and the

United States Attorney agrees that the jurisdiction of that court is not in question. Of course, the parties cannot bestow jurisdiction by agreement . . . (citation) . . . but we also agree that the court, under the facts of this case, had jurisdiction. At the time the petition for habeas corpus was filed the relator was still in the territorial jurisdiction of the United States District Court for the Northern District of Illinois. His subsequent removal by the respondent to Indiana did not rob the Illinois court of jurisdiction.”

This Court has inherent power to order appellant returned to the State of Washington (*Cf., Reed v. United States* (9 Cir., 1950) 181 F.2d 14).

The United States Supreme Court in the *Hayman* case (*United States v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263), directly decided that a District Court was not without power to compel the return of a prisoner for a hearing under 28 U.S.C.A. §2255. We have heretofore seen that the proceedings under §2255 are, in effect, Habeas Corpus in the sentencing court. In fact, if Congress had granted, in so many words, Habeas Corpus jurisdiction to sentencing courts and had withheld that jurisdiction from District Courts having territorial jurisdiction over the prisoner, except when the collateral attack in the sentencing court was inadequate or ineffective we would probably have had a lot less initial confusion over the effects of §2255.

The *Hayman* case cites the Habeas Corpus case of *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, as authority for the proposition that a prisoner may be ordered returned to the jurisdiction. It is true that the *Hayman* case involved a proceeding under §2255, but

§2255 confers no greater power upon the sentencing court than 28 U.S.C.A. §2241, *et seq.*, confers upon the court with territorial jurisdiction. This plus the fact that courts have inherent power and also statutory power to issue orders ancillary to Habeas Corpus proceedings gives this Court of Appeals full jurisdiction in the case at bar to dispose of the case as justice and law require. Appellant contends that the reasoning of the *Hayman* case, by analogy, is applicable, since §2255 confers upon the sentencing court the same authority for granting relief as previously might have been obtained through Habeas Corpus in a court having territorial jurisdiction. In the *Hayman* case the Supreme Court said:

“Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondents’ filing of a motion under that Section.

“The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue ‘all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.’ An order to secure respondent’s presence in the sentencing court to testify or otherwise prosecute his motion is ‘necessary or appropriate’ to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law.” (Also see note 38 in the *Hayman* case)

Appellant is not obliged to again seek relief in Alaska, because of the death of Judge Folta. All of appellant’s allegations and pleadings were formed and pre-

sented to court prior to Judge Folta's death. In fact, the Washington District Court rendered its final order prior to Judge Folta's death and had been informed that appellant would seek relief from a higher court if he was denied a hearing (R. 96). Appellant is not now obligated to return to the Alaska Court. In *Ekeberg v. McGee* (9 Cir., 1951) 191 F.2d 625, the appellee's argument was similar and analogous to the appellees' argument in the instant case. This Court said:

"The appellee also contends that appellant has not exhausted his state remedies because under the California law a decision on a petition for the writ of habeas is not *res judicata*. Hence, the argument is, he has still an 'available process' in a second petition for the writ setting forth the same grounds as in a prior writ.

"Assuming but not deciding that such is the California law, we do not so construe the provisions of §2254, for to do so would require the absurdity that a prisoner convicted under the California law never could have the benefit of that section. That section is satisfied where the applicant for the writ has once availed himself of his state remedies."

If this Court of Appeals holds that it does not have jurisdiction it will literally write Habeas Corpus off the books. Under such a holding there would be nothing to prevent the constant removal of a prisoner from within the territorial jurisdiction the moment he files a petition, thereby preventing forever his gaining a hearing to determine the question of whether or not he was being unlawfully detained. Under such a holding, the rules of Court would be rendered meaningless.

Under such a holding appellant might be subjected to

the same fruitless §2255 efforts time and time again. Appellant respectfully submits that this Court should meet this case head-on and decide the same according to the law and justice which we as Americans hold dear. In this case, the chips are down and liberty is at stake. We must wholly depend upon constitutional guarantees. There is no other recourse.

Respectfully submitted,

J. LAEL SIMMONS

KENNETH C. DAVIS

WM. H. SIMMONS

LESLIE M. YATES

SIMMONS, SIMMONS & YATES

Attorneys for Appellant.

No. 14834

United States
Court of Appeals
for the Ninth Circuit.

PETER COTTRELL SCOTT,

Appellant,

VS.

NORMA SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC 27 1955

No. 14834

United States
Court of Appeals
for the Ninth Circuit.

PETER COTTRELL SCOTT,

Appellant,

vs.

NORMA SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Petitioner and Appellee.

In the Southern Division of the United States District Court for the Northern District of California

No. 42377 In Bankruptcy

In the Matter of
PETER COTTRELL SCOTT,

Bankrupt.

SPECIFICATION OF OBJECTIONS
TO DISCHARGE

To: The Honorable Judges of the District Court of the United States, and

To: The Honorable Burton J. Wyman, Referee in Bankruptcy:

Norma Smith of 1464 Crow Canyon Road, Hayward, County of Alameda, State of California, a creditor of the above-named bankrupt, does hereby oppose the granting to said bankrupt of a discharge from his debts and specifies the following as grounds of objection:

1. (a) On or about January 12, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a house and lot known as 1520 Hicks Avenue, San Jose, California, with intent to hinder, delay and defraud his creditors.

(b) On or about July, 1953, subsequent to the first day of the twelve months immediately preced-

ing the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a 1952 Cadillac automobile with intent to hinder, delay and defraud his creditors.

2. On or about February 1, 1945, the bankrupt obtained money to wit: \$5,000.00 from Norma Smith, the objector herein, by publishing or causing to be made or published a materially false statement in writing respecting his financial condition, to wit: that in order to obtain the said loan of \$5,000.00 he falsely stated in writing that said loan was secured by a deed of trust of even date with note whereas he knew at all times that said loan was to be unsecured and that the lender, Norma Smith, relied and believed in said representation in advancing said \$5,000.00.

3. On or about January, 1951, the bankrupt as the agent of Norma Smith, the objector herein, sold for her account her Buick automobile and although he recovered \$615.00 from said sale failed to account or pay the same over to her or satisfactorily explain the said loss.

/s/ NORMA SMITH,
Petitioner.

/s/ LISTON O. ALLEN,
/s/ EMANUEL P. RAZETO,
Attorneys for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed June 15, 1954. Referee.

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE SUS-
TAINING OPPOSITION TO BANKRUPT'S
DISCHARGE IN BANKRUPTCY AND
DENYING SUCH DISCHARGE

Whereas, Peter Cottrell Scott heretofore was adjudged a bankrupt, by the above-entitled court, in the above-entitled matter, upon a petition filed, in said court, by said Peter Cottrell Scott, on December 18, 1953, and

Whereas, on June 15, 1954, Norma Smith filed, in the above-entitled matter, her verified "Specification of Objections to Discharge," opposing the discharge in bankruptcy of the aforesaid bankrupt, in which said specification of objections, said objector averred that she, as a creditor of said bankrupt was opposed to the granting, to said bankrupt, of a discharge of his debts, on the following grounds:

"1. (a) On or about January 12, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a house and lot known as 1520 Hicks Avenue, San Jose, California, with intent to hinder, delay and defraud his creditors.

"(b) On or about July, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a 1952

Cadillac automobile with intent to hinder, delay and defraud his creditors.

“2. On or about February 1, 1945, the bankrupt obtained money, to wit: \$5,000.00 from Norma Smith, the objector herein, by publishing or causing to be made or published a materially false statement in writing respecting his financial condition, to wit: that in order to obtain the said loan of \$5,000.00 he falsely stated in writing that said loan was secured by a deed of trust of even date with note whereas he knew at all times that said loan was to be unsecured and that the lender, Norma Smith, relied and believed in said representation in advancing said \$5,000.00.

“3. On or about January, 1951, the bankrupt as the agent of Norma Smith, the objector herein, sold for her account her Buick automobile and although he recovered \$615.00 from said sale failed to account or pay the same over to her or satisfactorily explain the said loss,” and

Whereas, a hearing was held upon the aforesaid specification of objections to the bankrupt's discharge in bankruptcy, before the undersigned referee in bankruptcy, on July 27, 1954, after due notice to the directly interested parties, during the course of which said hearing both the objector and the bankrupt were sworn and gave testimony, under oath, and

Whereas, under all of the circumstances and the facts shown by the evidence then offered and received, the undersigned referee in bankruptcy could not, and does not believe that the account given by

the bankrupt, under oath, relative to the manner in which the words, "This note is secured by a Deed of Trust bearing even date herewith," were made to appear upon the original promissory note (offered and received in evidence during the aforesaid hearing) was, or is, a true, or correct, account of the manner in which said last mentioned words were made so to appear on said promissory note, but does believe, and so finds, that said bankrupt, by said last mentioned words, induced said Norma Scott to rely on the truth and correctness thereof and that she, so relying, made the aforesaid loan in the belief that said loan was to be, and was, secured by a deed of trust, as on said promissory note stated, and

Whereas, the undersigned referee in bankruptcy finds, that the allegations set forth in Paragraph 2 of the aforesaid "Specification of Objections," are true and correct, and

Whereas, upon the record, as it now stands, the undersigned referee in bankruptcy does not feel in a position to find, with any degree of certainty and in fairness to each of the directly interested parties, whether, or not, the allegations set forth in Paragraph 1(a) and/or (b) of said "Specification of Objections to Discharge" are true or correct, or otherwise, and

Whereas, upon the record, as it now stands, the undersigned referee in bankruptcy does not feel in a position to find, with any degree of certainty, and in fairness to each of the directly interested parties, whether, or not, the bankrupt has "failed to account * * * or satisfactorily explain the loss" of

the sum of \$615.00, or any part thereof, as averred in Paragraph 3 of said "Specification of Objections to Discharge" and

Whereas, the undersigned referee in bankruptcy concludes, as matters of law:

(1) That the opposition to the bankrupt's discharge in bankruptcy herein should be sustained on the ground specified in Paragraph 2 of the aforesaid "Specification of Objections to Discharge";

(2) That Peter Cottrell Scott should be denied his discharge in bankruptcy herein for the last mentioned reason;

(3) That nothing herein contained, or set forth, in anywise, should be construed so as to preclude, or prevent, said Norma Smith from pursuing, in some other forum, whatever right, or rights, she may be advised that legally, she may have, as regards the matters set forth in Paragraph 1(a) and/or (b) and/or also in Paragraph 3 of the aforesaid "Specification of Objections to Discharge," so long as, in so pursuing such right, or rights (if any right she may have) said Norma Smith does not interfere, in any way whatsoever, with any right, or rights, which, on the date of the filing of the initial petition in bankruptcy herein, passed from Peter Cottrell Scott, to the bankruptcy estate of said Peter Cottrell Scott.

It, Therefore, Hereby Is Ordered, Adjudged and Decreed:

1. That the opposition to said bankrupt's discharge in bankruptcy herein should be, and is, Sustained on the ground specified in Paragraph 2 of the

aforesaid "Specification of Objections to Discharge."

2. That based upon the record herein, and in the light of the specific findings of fact with regard to the allegations set forth in Paragraph 2 of the aforesaid "Specification of Objections to Discharge," and pursuant to, and in compliance with, Paragraph (2) of the hereinbefore set forth conclusions of law, the discharge in bankruptcy herein of Peter Cottrell Scott be, and said discharge is, Denied.

3. That nothing herein contained is intended to be, nor is it to be, construed, that said Norma Smith, in any way whatsoever, is precluded, or prevented, from pursuing, in some other forum, whatever right, or rights, she may be advised that, legally, she may have, as regards the matters set forth in Paragraph 1(a) and/or (b) and/or in Paragraph 3 of the aforesaid "Specification of Objections to Discharge," so long as, in so pursuing such right, or rights (if any right she may have), said Norma Smith does not interfere, in any way whatsoever, with any right, or rights, which, on the date of the filing of the initial petition in bankruptcy herein, passed from Peter Cottrell Scott, to the bankruptcy estate of said Peter Cottrell Scott.

Dated: September 21st, 1954.

/s/ BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed September 21, 1954, Referee.

[Endorsed]: Filed September 22, 1954, U.S.D.C.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

To: Burton J. Wyman, Esq., Referee in Bankruptcy.

The petition of Peter Cottrell Scott respectfully represents:

That your petitioner is the bankrupt herein;

That Norma Smith, a creditor of the above-named bankrupt, filed herein her Specification of Objections to Discharge of the above-named bankrupt, verified the 14th day of June, 1954, and thereafter on the 27th day of July, 1954, the said Specification of Objections to Discharge came on for hearing on briefs and oral argument submitted by petitioner and said Norma Smith;

That on the 21st day of September, 1954, an Order was made by the above-named Referee in Bankruptcy and entered herein sustaining the objection to discharge of the above-named bankrupt on grounds set forth in Paragraph 2 of the aforesaid Specification of Objections to Discharge, and denying the discharge in bankruptcy of the above-named bankrupt; that a copy of said Order, designated "Exhibit A," is attached hereto and made a part hereof; that your petitioner is aggrieved by the said Order;

That the said Order is erroneous in the following respects and for the following reasons:

1. The referee erred in respect to said Order, in

that the referee's finding on page 3 of said Order, lines 10 to 26, that petitioner induced Norma *Scott* to loan money to petitioner by a false statement in writing was clearly erroneous, in that the evidence fails to support said finding as the uncontradicted testimony of petitioner and said Norma Smith was that the aforementioned alleged false statement in writing was neither delivered to Norma Smith, received by Norma Smith, nor known to Norma Smith until several days subsequent to the making of said loan by Norma Smith;

2. The referee erred in respect to said Order, in that the referee's finding on page 3 of said Order, lines 27 to 30, that the allegations set forth in Paragraph 2 of the aforesaid "Specification of Objections" are true and correct, was clearly erroneous, in that the evidence fails to support said finding, as the uncontradicted evidence was that said alleged false statement in writing did not induce Norma Smith to make the said loan to petitioner, and that Norma Smith did not rely on said alleged false statement in writing in making said loan, and that petitioner did not obtain money or property on credit or obtain an extension or renewal of credit by making or causing to be made a false statement in writing respecting his financial condition;

3. The referee erred in respect to said Order, in his conclusions of law numbered 1 and 2, that specification contained in Paragraph 2 of "Specification to Objections to Discharge" filed by Norma Smith was sustained and that for this reason petitioner's

discharge in bankruptcy was denied; said conclusions of law are erroneous in that (a) the alleged material false statement in writing respecting the bankrupt's financial condition consisted of the words, "This note is secured by a Deed of Trust bearing even date herewith" appearing on a promissory note given by petitioner to Norma Smith; according to the law such a statement is not one "respecting financial condition" within the meaning of Bankruptcy Act Sec. 14(c)(3); (b) the findings of fact upon which said conclusions of law are based are not supported by the evidence, in that all of the evidence was that the aforesaid false statement in writing was made after money was loaned by Norma Smith to petitioner; (c) the aforesaid alleged false statement in writing respecting financial condition did not, according to uncontradicted evidence, enable petitioner to obtain money or property on credit or obtain an extension or renewal of credit;

4. The referee erred in respect to said Order in that said Order contains no finding that the aforesaid alleged false statement in writing was a "material" false statement as required by provision of Bankruptcy Act Sec. 14(c)(3), and for this reason the referee's conclusions of law numbers 1 and 2 are erroneous;

5. The referee erred in respect to said Order in that said Order contains no finding that the aforesaid alleged false statement in writing was intentionally made by petitioner with an intent to defraud his creditor as required by provision of Bank-

ruptcy Act Sec. 14(c)(3), and for this reason the referee's conclusions of law numbers 1 and 2 are erroneous;

6. The referee erred in respect to said Order in that orders numbered 1 and 2 are erroneous for the reasons hereinabove set forth;

Wherefore, your petitioner prays that said Order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, and that said Order be modified in the following respects:

1. That under the evidence it is not true that petitioner obtained money or property on credit nor obtained an extension or renewal of credit by making, or causing to be made, a material false statement in writing respecting his financial condition;

2. That as a matter of law the written statement, "This note secured by a deed of trust bearing even date herewith" is not a statement respecting financial condition so as to bar petitioner's discharge in bankruptcy under provisions of Bankruptcy Act, Sec. 14(c)(3);

3. That under the evidence the aforementioned false statement in writing did not induce Norma Smith to make a loan to petitioner;

4. That the aforesaid false statement in writing was not material under the circumstances of this case;

5. That according to the evidence herein, the

aforesaid false statement in writing was not intentionally made by petitioner with intent to defraud his creditors;

6. That petitioner is entitled to a discharge in bankruptcy, and that the same is granted;

7. For such other and further relief as is just.

Dated: September 30, 1954.

/s/ PETER COTTRELL SCOTT,
Petitioner.

/s/ FRED A. WOOL,
Attorney for Petitioner.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed September 30, 1954, Referee.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO PETITION FOR REVIEW
OF REFEREE'S ORDER, JUDGMENT
AND DECREE SUSTAINING OPPOSITION
TO BANKRUPT'S DISCHARGE IN
BANKRUPTCY AND DENYING SUCH
DISCHARGE

To Honorable Louis E. Goodman, United States
District Judge for the Northern District of
California:

I, Burton J. Wyman, one of the referees in bank-

ruptcy of the above-entitled court and the referee primarily in charge of the above-entitled bankruptcy proceeding, hereby certify and report that this specific matter is now before the above-entitled United States District Court, sitting as an appellate court*, upon the following verified "Petition for Review of Referee's Order by Court":

"The petition of Peter Cottrell Scott respectfully represents:

"That your petitioner is the bankrupt herein;

"That Norma Smith, a creditor of the above-named bankrupt, filed herein her Specification of Objections to Discharge of the above-named bankrupt, verified the 14th day of June, 1954, and thereafter on the 27th day of July, 1954, the said Specification of Objections to Discharge came on for hearing on briefs and oral argument submitted by petitioner and said Norma Smith;

"That on the 21st day of September, 1954, an Order was made by the above-named Referee in Bankruptcy and entered herein sustaining the objection to discharge of the above-named bankrupt on grounds set forth in Paragraph 2 of the aforesaid Specification of Objections to Discharge, and denying the discharge in bankruptcy of the above-named

*"In passing upon a petition for review of a referee's order, 'the proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.' *In re Pearlman* (C.C.A.) 16 F. (2d) 20, 21."

In re Big Blue Min. Co., (D.C., N.D., Calif.) 16 F. Supp. 50, 51 (Opinion by St. Sure, District Judge).

bankrupt; that a copy of said Order, designated 'Exhibit A,' is attached hereto and made a part hereof; that your petitioner is aggrieved by the said Order;

"That the said Order is erroneous in the following respects and for the following reasons:

"1. The referee erred in respect to said Order, in that the referee's finding on page 3 of said Order, lines 10 to 26, that petitioner induced Norma *Scott* to loan money to petitioner by a false statement in writing was clearly erroneous, in that the evidence fails to support said finding as the uncontradicted testimony of petitioner and said Norma Smith was that the aforementioned alleged false statement in writing was neither delivered to Norma Smith, received by Norma Smith, nor known to Norma Smith until several days subsequent to the making of said loan by Norma Smith;

"2. The referee erred in respect to said Order, in that the referee's finding on page 3 of said Order, lines 27 to 30, that the allegations set forth in Paragraph 2 of the aforesaid 'Specification of Objections' are true and correct, was clearly erroneous, in that the evidence fails to support said finding, as the uncontradicted evidence was that said alleged false statement in writing did not induce Norma Smith to make the said loan to petitioner, and that Norma Smith did not rely on said alleged false statement in writing in making said loan, and that petitioner did not obtain money or property on credit or obtain an extension or renewal of credit by making or causing to be made a false statement in writing respecting his financial condition;

“3. The referee erred in respect to said Order, in his conclusions of law numbered 1 and 2, that specification contained in Paragraph 2 of ‘Specifications to Objections to Discharge’ filed by Norma Smith was sustained and that for this reason petitioner’s discharge in bankruptcy was denied; said conclusions of law are erroneous in that (a) the alleged material false statement in writing respecting the bankrupt’s financial condition consisted of the words, ‘This note is secured by a Deed of Trust bearing even date herewith’ appearing on a promissory note given by petitioner to Norma Smith; according to the law such a statement is not one ‘respecting financial condition’ within the meaning of Bankruptcy Act Sec. 14(c)(3); (b) the findings of fact upon which said conclusions of law are based are not supported by the evidence, in that all of the evidence was that the aforesaid false statement in writing was made after money was loaned by Norma Smith to petitioner; (c) the aforesaid alleged false statement in writing respecting financial condition did not, according to uncontradicted evidence, enable petitioner to obtain money or property on credit or obtain an extension or renewal of credit;

“4. The referee erred in respect to said Order in that said Order contains no finding that the aforesaid alleged false statement in writing was a ‘material’ false statement as required by provision of Bankruptcy Act Sec. 14(c)(3), and for this reason the referee’s conclusions of law numbers 1 and 2 are erroneous;

“5. The referee erred in respect to said Order in

that said Order contains no finding that the aforesaid alleged false statement in writing was intentionally made by petitioner with an intent to defraud his creditor as required by provision of Bankruptcy Act Sec. 14(c)(3), and for this reason the referee's conclusions of law numbers 1 and 2 are erroneous;

"6. The referee erred in respect to said Order in that orders numbered 1 and 2 are erroneous for the reasons hereinabove set forth;

"Wherefore, your petitioner prays that said Order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, and that said Order be modified in the following respects:

"1. That under the evidence it is not true that petitioner obtained money or property on credit nor obtained an extension or renewal of credit by making, or causing to be made, a material false statement in writing respecting his financial condition;

"2. That as a matter of law the written statement, 'This note secured by a deed of trust bearing even date herewith' is not a statement respecting financial condition so as to bar petitioner's discharge in bankruptcy under provisions of Bankruptcy Act, Sec. 14(c)(3);

"3. That under the evidence the aforementioned false statement in writing did not induce Norma Smith to make a loan to petitioner;

"4. That the aforesaid false statement in writing was not material under the circumstances of this case;

“5. That according to the evidence herein, the aforesaid false statement in writing was not intentionally made by petitioner with intent to defraud his creditors;

“6. That petitioner is entitled to a discharge in bankruptcy, and that the same is granted;

“7. For such other and further relief as is just.

“Dated: September 30, 1954.

“/s/ PETER COTTRELL SCOTT,
“Petitioner.

“/s/ FRED A. WOOL,
“Attorney for Petitioner.”

[Verification omitted for sake of brevity].

(Although the copy of the “Order, Judgment and Decree,” etc., referred to on page one of said petition for review, and, by said reference, made a part of said petition for review has been omitted, at this point, from this certificate and report, the original thereof later will be inserted in said certificate and report, as one of the parts of said certificate and report.)

The circumstances which gave rise to the aforesaid petition for review are as follows:

On June 15, 1954, the following verified “Specification of Objections to Discharge” were filed in the above-entitled proceeding:

“Norma Smith of 1464 Crow Canyon Road, Hayward, County of Alameda, State of California, a creditor of the above-named bankrupt, does hereby

oppose the granting to said bankrupt of a discharge from his debts and specifies the following as grounds of objection:

“1. (a) On or about January 12, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a house and lot known as 1520 Hicks Avenue, San Jose, California, with intent to hinder, delay and defraud his creditors.

“(b) On or about July, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: a 1952 Cadillac automobile with intent to hinder, delay and defraud his creditors.

“2. On or about February 1, 1945, the bankrupt obtained money, to wit: \$5,000.00 from Norma Smith, the objector herein, by publishing or causing to be made or published a materially false statement in writing respecting his financial condition, to wit: that in order to obtain the said loan of \$5,000.00 he falsely stated in writing that said loan was secured by a deed of trust of even date with note whereas he knew at all times that said loan was to be unsecured and that the lender, Norma Smith, relied and believed in said representation in advancing said \$5,000.00.

“3. On or about January, 1951, the bankrupt as the agent of Norma Smith, the objector herein, sold

for her account her Buick automobile and although he recovered \$615.00 from said sale failed to account or pay the same over to her or satisfactorily explain the said loss.

“/s/ NORMA SMITH,
“Petitioner.

“/s/ LISTON O. ALLEN,
“/s/ EMANUEL P. RAZETO,
“Attorneys for Petitioner.

“LISTON O. ALLEN,
“EMANUEL P. RAZETO,
“709 Financial Center Bldg.,
“Oakland 12, California.”

[Verification omitted for sake of brevity.]

The opposition to the bankrupt's discharge based on the aforesaid specification of objections, after due notice to the directly interested parties, came on for hearing before the undersigned referee in bankruptcy, on July 27, 1954, at which time there appeared, Emanuel P. Razeto, Esq., who, with Liston O. Allen, Esq., are the attorneys for Mrs. Norma Smith, the objecting creditor; Francis P. Walsh, Esq., the attorney for Ramon J. Truman, the trustee in bankruptcy herein; and Fred A. Wool, Esq., the attorney for the bankrupt.

During the course of the hearing, evidence, both oral and documentary, was offered and received, the

testimony of Mrs. Norma Smith, said objecting creditor given, on direct examination in response to questions by her counsel, in substance being as follows:

I reside at 1464 Crow Canyon Road, Hayward: the \$5,000.00 note which you show me has the signature of Mr. Peter C. Scott.

[At this point, the promissory note was introduced in evidence as "Objecting Creditor's No. 1."] It reads:

"This flat note hereinafter stated we jointly and severally promise to pay to Norma Smith as joint tenants or order the principal sum of (\$5,000.00) Five Thousand Dollars with interest from date hereof on the amounts of principal sum remaining from time to time unpaid until said principal sum is paid, at the rate of ($4\frac{1}{2}\%$) Four and one-half per cent per annum. Interest payable semi-annually on February 5th and August 5th of each year and continuing for a period of (10) ten years. Providing, however, that the whole of the principal sum remaining unpaid shall be paid in full on or before (10) ten years after date. Any or all of the principal sum may be paid at any time during the period of this note without penalty.

"This note is secured by a Deed of Trust bearing even date herewith."

I gave Peter C. Scott and Elizabeth A. Scott \$5,000.00 for that note; I never received a Deed of Trust securing the note; Mr. Scott told me there is not in existence a Deed of Trust securing this note; the first time Mr. Scott informed me that the note

was not secured by a Deed of Trust was October, 1953; I had gone to San Jose and had met Mr. Burkhalter (who has now passed away) and we met Mr. Scott; we met him in front of Cathay Motors in San Jose, on South First Street; I told Mr. Scott I heard he sold his house; I asked him if that was true and I asked him about the Deed of Trust, then he told us, in the conversation, there had been no Deed of Trust given at any time; he said the money was in escrow and would be paid in about a week's time and he would pay me then, he wanted to pay it in full at that time; that was the first I had known there was no Deed of Trust; at that time (during the aforesaid conversation) he assured me that I would be paid out of an escrow; I think he said the escrow was in the California Pacific Title—afterwards Mr. Burkhalter told me—the three of us were there when he told me about the escrow—we were all present, sitting in Mr. Scott's car at the time.

I never received any money from the escrow; I have not been paid on this note.

The \$5,000.00 note is included in the third item of Schedule A-3 ("Creditors Whose Claims Are Unsecured") of the bankrupt's schedules in bankruptcy, signed by Peter C. Scott, which you show me, the third item reading: "Norma Smith, 1464 Crow Canyon Road, R.F.D. Hayward, California; Note \$10,615.00."

Going back to February 1, 1945, when this note was executed by Mr. Scott and (was) given in exchange for the \$5,000.00, I received it from Mr.

Scott; I don't know who prepared it—I presume Mr. Scott; the note there is the way it came to me—handed to me by Mr. Scott.

Prior to the lending to Mr. Scott of the \$5,000.00 in question he said it would be secured by a Deed of Trust—a mortgage on the house, 1520 Hicks Avenue, San Jose; in the conversation, he said that they were refinancing their home and I might as well have the interest as paying the bank or someone else; I don't remember just what it was.

My relationship to Mr. and Mrs. Scott at that time—February 1, 1945—was very, very close, about the closest friends I had; I was a widow, at that time.

Mr. Scott has made payments of interest to me under the note, twice a year up until—I think the last one was in 1952; I don't remember just exactly; neither during this period, nor at any time, when he made payments to me, did he tell me the note was not secured by a Deed of Trust.

If I had known that the note was not secured by a Deed of Trust, I would not have loaned him the money, at that particular time; I believed him when he told me it was secured by a Deed of Trust—I had no reason to believe otherwise.

At no time in January, 1953, did Mr. Scott inform me that he had sold, or transferred the house; he did not pay me any money at that time.

In August, 1953, I had a conversation with Mr. Scott regarding my loan; I went to San Jose just before I went on vacation, the last of the month; I asked him to put the two notes on my mortgage

on the house; he said he would look it up; he did not know whether the papers were at the house or the bank; he would take care of it; at that time he did not tell me that it was not secured by a Deed of Trust, nor that the house had been sold.

(At the close of the direct testimony counsel for the bankrupt made a motion to strike out the testimony of the objecting creditor, on "Point No. 2" of the specification on the ground, in substance, that such testimony did not tend to show, as required by Section 14c(3) of the Bankruptcy Act [11 USCA, § 32c(3)] that the bankrupt had "obtained money or property on credit * * * by making, or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition," but ruling on this point was reserved.)

On cross-examination, the objecting creditor, questioned by counsel for the bankrupt, in substance testified:

I paid this \$5,000.00 to Mr. Scott by a check; I don't recall when I gave him the check—it was 1945, sometime in February, 1945; I got the note about the same time; I got the note after I gave the check; I don't remember how long after—I think several days elapsed; the note was given to me in San Jose; I was down visiting the Scotts at that time; the check was given to Mr. Scott in San Jose; both Mr. and Mrs. Scott were there when I gave the check; I took it down on a week end and gave it to them; I visited back and forth with the Scotts for a number of years; Mrs. Elizabeth Scott now

is dead, she died January, 1952; the note never was discussed at any of the meetings with the Scotts from 1945 to 1952.

At that time Mr. Scott was engaged in the used car business; I sometimes would be down to see them twice a week; Mrs. Scott was teaching at the University—I used to go down week ends; when she was teaching during summer school, she would stay with us in Alameda.

Immediately following Mrs. Scott's death, I did not discuss with him anything about his financial affairs; I did not think it was necessary; I had a mortgage, so I thought—the interest was paid, so, I had no occasion to; I did not inquire; I did not think it necessary.

Peter Cottrell Scott, the bankrupt, called as a witness on behalf of the objecting creditor and questioned by counsel for the objecting creditor, testified, in substance:

I now reside at 2015 Ray Drive, Burlingame, California; on February 1, 1945, I owned a house at 1520 Hicks Avenue, San Jose; at that time that house had a mortgage against it; the mortgage then was in the name of A. J. De Smet; I am not positive what the balance due at that time was, but approximately \$6,000.00; the Deed of Trust was re-conveyed to me somewhere (near) March 24, 1945; at a later date, I again encumbered this house; at the time, on about February 1, 1945, when Mrs. Smith loaned me the \$5,000.00 my house on Hicks Avenue was encumbered by A. J. De Smet.

When I wrote this note stating this is secured by

a Deed of Trust of even date herewith, there was no Deed of Trust; this note is a note that I copied from a note that I had in my possession; I mean, among some papers that I had, and it had this particular type of note on it and that is what I copied and later gave Mrs. Smith; I typed this note myself, from the first word to the last word; I believe I understood what I had written.

I owned other property at that time—a lot adjacent to the Hicks Avenue property; that was under a separate Deed (from) the Hicks Avenue property; I never gave Mrs. Smith a Deed of Trust on that lot; I am not positive whether that lot was encumbered on February 1, 1945; I purchased it and after due time paid it, over a period of time; I did not give Mrs. Smith a Deed of Trust at any time.

That is my signature on the photostatic copy of the Deed which you show me.

(At this point the Deed was offered in evidence as Objecting Creditor's No. 2 and reads as follows.)

“I, Peter C. Scott, a single man, the First Party, hereby grant to Barbara D. Stevens, a single woman, the Second Party, all of the real property situated in the City of San Jose, County of Santa Clara, State of California, described as follows:

“Lot Twenty (20) in Block Two (2) as laid down, designated and delineated upon that certain Map entitled ‘Map of Cherry Park’ recorded October 15, 1923, in the Office of the County Recorder of the

County of Santa Clara, State of California, in Book
R of Maps, Page 42.

“Witness my hand this 13th of January, 1953.

“PETER C. SCOTT.

“State of California,
County of Santa Clara—ss.

“On this 13th day of January, 1953, before me,
Fred A. Wool, a Notary Public in and for said
County and State, personally appeared Peter C.
Scott, being the person whose name is subscribed
to the foregoing instrument, and acknowledged to
me that he executed the same.

“FRED A. WOOL,
“Notary Public.”

[“Mr. Razeto: * * * This Deed was recorded
January 26 at 1:30 o'clock p.m., 1953, and bears
revenue stamps of \$17.60.”]

“By this Deed, you alleged, or tried to transfer
your title to the Hicks Avenue property to Barbara
Stevens. Is that right?

“A. I did transfer it.”

That was on January 13, 1953, when I signed
this Deed; I married Barbara Stevens the next day,
January 14; when I executed this Deed, in the office
of my attorney, Fred A. Wool, on January 13, 1953,
Mrs. Stevens was with me, at the time; the three of
us, I, Mrs. Stevens and Mr. Wool, were there; the
price, the consideration for this house was \$16,-
000.00; she was to pay me \$16,000.00 in cash and

this was deposited in escrow; at that time I did not inform Mrs. Stevens or Mr. Wool that I had promised a Deed of Trust on this house to Mrs. Smith; I did not give any instructions to the title company to pay out of the \$16,000.00, \$5,000.00 to Mrs. Smith; A. J. De Smet was paid from the proceeds of that \$16,000.00; I paid \$10,500.00 to A. J. De Smet; I assume that went on record at the same time the Deed went on record, January 26, 1953, which was in the week after I married Mrs. Stevens.

In July, 1953, I transferred to my wife a 1948 Cadillac, Model Sixty-two sedan, and she still has that automobile; the consideration for the automobile was \$1,100.00, what she paid for it; I haven't ownership in it.

On December 18, 1953, when I filed the petition in bankruptcy, Mrs. Smith had a credit on my books for \$615.00 for the sale of a 1941 Buick automobile; I was her agent for the sale of her automobile and had recovered \$615.00 for the sale of same and I did not turn that money over to her; I accounted to her verbally for that money.

Cross-examined by his counsel, the bankrupt, in substance, testified:

I recall approximately the amount of the disbursements in connection with the sale of the Hicks Avenue property which I made to Barbara D. Stevens in January, 1953; I received \$5,300.00, either seventeen or seventy-five, something like that—\$5,300.00 and some-odd dollars; I already have testified that I paid to Mr. A. J. De Smet, or had

paid out of the escrow, \$10,500.00; the difference between that and these two sums I mentioned of the \$16,000.00, I deposited in my account in the bank and used it in my business, that is my \$5,375.90; as regards certain expenses in connection with the sale, there was a title bond, I recollect; the amounts, whatever the title charge was for the title insurance and that sort of thing was taken from it—revenue stamps; the sale price was \$16,000.00; demand of A. J. De Smet, \$10,500.00; recording Deed and Reconveyance, \$4.00; title fee, \$99.00; Revenue stamps, \$17.60; trustee fee, \$3.50; balance due, \$5,000.00 of which I deposited in my account—my business account; I didn't have any other accounts; the \$375.90 I took for expense money to live on.

(At this point a document, headed "San Jose Abstract & Title Insurance Co.," was admitted in evidence as Bankrupt's Exhibit No. 1.)

I had had the 1948 Cadillac on the lot approximately a year and a half; it was floored with the American Trust Company on the regular flooring plan—trust receipt and \$1,050.00 was due under that, or thereabouts, maybe forty-six or forty-seven; the bank had been urging me or they had been attempting to collect this flooring on this; it was out of the ordinary to carry a car that long and they were making a demand on me to reduce my flooring at the time on that; the value of the automobile constantly was depreciating every month, as shown by the book; over this period I had attempted to sell it, then I sold it to Mrs. Scott; with regard to the

fair value of that automobile, it was much better than I received from later models that I sold under duress.

I did not furnish or transfer or place at the disposal of Barbara Stevens any part of that \$16,000.00 which she paid for the Hicks Avenue property; I did not place at the disposal of, give, or lend credit, in any way to Mrs. Scott, with any part of the \$1,098.00 which was paid for the 1948 Cadillac automobile; the major portion of that was given to the bank; I had not given her any portion of the amount she paid for that.

Mrs. Smith gave me the 1941 Buick to sell for her and I, in turn, sold the automobile, took a trade in, sold the trade in; the final disposition of the automobile was \$615.00, which we set up on my books a credit to Mrs. Smith; in discussing it, I told Mrs. Smith what we had received for the automobile; sometime late in the year, I gave Mrs. Smith a check for sixty some-odd dollars as ten per cent interest on this amount of money which she received, and it continued on my books as a credit to Mrs. Smith, which I used in my business; at no time did I pay Mrs. Smith any of the principal of this amount received for this automobile; some time during 1952 I, at various times, discussed it with Mrs. Smith when no one beside us was present and, at one time Mrs. Smith said that she did not need the money at that time and would just as well have the interest on it; I paid her a check for one year's interest at ten per cent.

Questioned by counsel for the objecting creditor, on redirect examination, the bankrupt testified:

About January 26, when I executed the Deed to Mrs. Stevens in the office of my attorney, Mr. Wool, in her presence, I did not come to any agreement regarding the retention of any interest in the property—if she should sell it that I would get any money back; there was no understanding when she was to resell it.

With regard as to how I arrived at the consideration of \$16,000.00, I discussed it with Jeffries, a real estate man down there, and, upon the Real Estate Board's appraisal during the probate of the estate, the property was valued at something around \$14,000.00 at that time by them and I thought \$16,000.00 would be a fair price; I did not enter into any agreement with Mrs. Stevens to the effect that I would still manage the property for her, help her sell it, anything like that; I continued to live in the house after I sold it to her; I remained in possession one day; I moved to 2015 Ray Drive when I returned from being married; the following day after executing the deed at my attorney's office, I took off for Reno and married Mrs. Stevens and afterwards I returned to Ray Drive; on occasions I went back to the San Jose home; I had personal things I had to get out; I had all my household furniture and equipment there; other than several times when we stayed there or I happened to stay in San Jose overnight for some particular reason, that I stayed there, the house was empty from January 14, when I married Mrs. Stevens, until it

was sold to the Johnsons; I cannot say offhand whether I ever told my friends or associates that I had sold the house to my wife; I know James Wayne, a broker in San Jose; I never rented the house after I sold it; I don't know who paid the taxes in April of 1953; I could have.

The matter having been submitted on briefs, at the conclusion of the aforesaid hearing, and the briefs having been read and considered the following herein complained of "Order, Judgment and Decree Sustaining Opposition to Bankrupt's Discharge in Bankruptcy and Order Denying Such Discharge" was signed by the undersigned referee in bankruptcy and filed in the above-entitled bankruptcy proceeding:

"Whereas, Peter Cottrell Scott heretofore was adjudged a bankrupt, by the above-entitled court, in the above-entitled matter, upon a petition filed, in said court, by said Peter Cottrell Scott, on December 18, 1953, and

"Whereas, on June 15, 1954, Norma Smith filed, in the above-entitled matter, her verified 'Specification of Objections to Discharge,' opposing the discharge in bankruptcy of the aforesaid bankrupt, in which said specification of objections, said objector averred that she, as a creditor of said bankrupt, was opposed to the granting, to said bankrupt, of a discharge of his debts, on the following grounds:

"1. (a) On or about January 12, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bank-

ruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: A house and lot known as 1520 Hicks Avenue, San Jose, California, with intent to hinder, delay and defraud his creditors.

“(b) On or about July, 1953, subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy herein, the bankrupt transferred to his wife, Barbara Stevens Scott, certain of his property, to wit: A 1952 Cadillac automobile with intent to hinder, delay and defraud his creditors.

“2. On or about February 1, 1945, the bankrupt obtained money, to wit: \$5,000.00 from Norma Smith, the objector herein, by publishing or causing to be made or published a materially false statement in writing respecting his financial condition, to wit: That in order to obtain the said loan of \$5,000.00 he falsely stated in writing that said loan was secured by a deed of trust of even date with note whereas he knew at all times that said loan was to be unsecured and that the lender, Norma Smith, relied and believed in said representation in advancing said \$5,000.00.

“3. On or about January, 1951, the bankrupt, as the agent of Norma Smith, the objector herein, sold for her account her Buick automobile and although he recovered \$615.00 from said sale failed to account or pay the same over to her or satisfactorily explain the said loss,’ and

“Whereas, a hearing was held upon the aforesaid specification of objections to the bankrupt’s dis-

charge in bankruptcy, before the undersigned referee in bankruptcy, on July 27, 1954, after due notice to the directly interested parties, during the course of which said hearing both the objector and the bankrupt were sworn and gave testimony, under oath, and

“Whereas, under all of the circumstances and the facts shown by the evidence then offered and received, the undersigned referee in bankruptcy could not, and does not believe that the account given by the bankrupt, under oath, relative to the manner in which the words, ‘This note is secured by a Deed of Trust bearing even date herewith,’ were made to appear upon the original promissory note (offered and received in evidence during the aforesaid hearing) was, or is, a true, or correct, account of the manner in which said last mentioned words were made so to appear on said promissory note, but does believe, and so finds, that said bankrupt, by said last mentioned words, induced said Norma Scott to rely on the truth and correctness thereof and that she, so relying, made the aforesaid loan in the belief that said loan was to be, and was, secured by a deed of trust, as on said promissory note stated, and

“Whereas, the undersigned referee in bankruptcy finds, that the allegations set forth in Paragraph 2 of the aforesaid ‘Specification of Objections,’ are true and correct, and

“Whereas, upon the record, as it now stands, the undersigned referee in bankruptcy does not feel in a position to find, with any degree of certainty and

in fairness to each of the directly interested parties, whether, or not, the allegations set forth in paragraph 1.(a) and/or (b) of said 'Specification of Objections to Discharge' are true or correct, or otherwise, and

"Whereas, upon the record, as it now stands, the undersigned referee in bankruptcy does not feel in a position to find, with any degree of certainty, and in fairness to each of the directly interested parties, whether or not, the bankrupt has 'failed to account * * * or satisfactorily explain the loss' of the sum of \$615.00, or any part thereof, as averred in Paragraph 3 of said 'Specification of Objections to Discharge' and

"Whereas, the undersigned referee in bankruptcy concludes, as matters of law:

"(1) That the opposition to the bankrupt's discharge in bankruptcy herein should be sustained on the ground specified in Paragraph 2 of the afore-said 'Specification of Objections to Discharge';

"(2) That Peter Cottrell Scott should be denied his discharge in bankruptcy herein for the last mentioned reason;

"(3) That nothing herein contained, or set forth, in anywise, should be construed so as to preclude, or prevent, said Norma Smith from pursuing, in some other forum, whatever right, or rights, she may be advised that legally, she may have, as regards the matters set forth in Paragraph 1(a) and/or (b) and/or also in Paragraph 3 of the afore-said 'Specification of Objections to Discharge,' so long as, in so pursuing such right, or rights (if any

right she may have), said Norma Smith does not interfere, in any way whatsoever, with any right, or rights, which, on the date of the filing of the initial petition in bankruptcy herein, passed from Peter Cottrell Scott, to the bankruptcy estate of said Peter Cottrell Scott.

“It, Therefore, Hereby Is Ordered, Adjudged and Decreed:

“1. That the opposition to said bankrupt’s discharge in bankruptcy herein should be, and is, Sustained on the ground specified in Paragraph 2 of the aforesaid ‘Specification of Objections to Discharge.’

“2. That based upon the record herein, and in the light of the specific findings of fact with regard to the allegations set forth in Paragraph 2 of the aforesaid ‘Specification of Objections to Discharge,’ and pursuant to, and in compliance with, Paragraph (2) of the hereinbefore set forth conclusions of law, the discharge in bankruptcy herein of Peter Cottrell Scott be, and said discharge is, Denied.

“3. That nothing herein contained is intended to be, nor is it to be, construed, that said Norma Smith, in any way whatsoever, is precluded, or prevented, from pursuing, in some other forum, whatever right, or rights, she may be advised that, legally, she may have, as regards the matters set forth in Paragraph 1(a) and/or (b) and/or in Paragraph 3 of the aforesaid ‘Specification of Objections to Discharge,’ so long as, in so pursuing such right, or rights (if any right she may have), said Norma Smith does not interfere, in any way whatsoever, with any right, or rights, which, on the

date of the filing of the initial petition in bankruptcy herein, passed from Peter Cottrell Scott, to the bankruptcy estate of said Peter Cottrell Scott.

“Dated: September 21st, 1954.

“BURTON J. WYMAN,

“Referee in Bankruptcy.”

In due time the petition for review copied into the beginning of this certificate and report was filed with said undersigned referee in bankruptcy.

Papers Handed Up Herewith

The papers which are handed up herewith, as parts of this certificate and report, are as follows:

1. Petition for Review of Referee's Order by Judge.
2. Specification of Objections to Discharge.
3. Reporter's Transcript of Hearing of July 27, 1954, Relative to Opposition to Discharge of Bankrupt.
4. Opening Brief of Objecting Creditor Norma Smith to Discharge of Bankrupt.
5. Reply Brief of Peter Cottrell Scott.
6. Reply Brief of Objecting Creditor Norma Smith.
7. Envelope Containing Exhibits.

Dated: January 13, 1955.

Respectfully submitted,

/s/ BURTON J. WYMAN,

Referee in Bankruptcy.

[Endorsed]: Filed January 13, 1955, U.S.D.C.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 42377—In Bankruptcy

In the Matter of:

PETER COTTRELL SCOTT,

Bankrupt.

ORDER

The Order, Judgment and Decree of the Referee in Bankruptcy in the above-entitled action, dated September 21, 1954, is hereby affirmed.

The findings of fact made by the Referee in Bankruptcy in his order of September 21, 1954, are hereby approved and adopted by this Court as its findings of fact.

The statement of the bankrupt that his note was secured by a deed of trust amounted to a representation that he owned certain real property and that this property was of sufficient value to and did secure the note. This was a materially false statement and certainly was one respecting his financial condition.

Dated: May 10, 1955.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed May 11, 1955, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Peter Cottrell Scott, the bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order entered in the office of the Clerk of this Court on the eleventh day of May, affirming the order of the Referee sustaining Petitioner's opposition to Bankrupt's Discharge in Bankruptcy and denying such discharge.

Dated: June 8, 1955.

/s/ DONALD B. RICHARDSON, JR.,
Attorney for the Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 8, 1955, U.S.D.C.

In the Southern Division of the United States District Court for the Northern District of California

No. 42377

Before: Honorable Burton J. Wyman, Referee in Bankruptcy.

In the Matter of:

PETER COTTRELL SCOTT,

Bankrupt.

Tuesday, July 27, 1954—10:00 A.M.

OPPOSITION TO DISCHARGE
OF BANKRUPT

Appearances:

For Objecting Creditor:

E. P. RAZETO, ESQ.

For Trustee:

FRANCIS P. WALSH, ESQ.

For Bankrupt:

FRED A. WOOL, ESQ.

The Referee: Are you ready to proceed in the matter of Peter Cottrell Scott?

Mr. Razeto: Ready, your Honor.

Mr. Walsh: Ready for the bankrupt.

The Referee: Call your first witness.

Mr. Razeto: I am appearing in association with Mr. Liston O. Allen, representing the objecting creditor.

Mr. Wool: Fred A. Wool, appearing for the bankrupt.

The Referee: Mr. Walsh represents the trustee. You may proceed, Counsel.

Mr. Razeto: May we have a stipulation at this time, your Honor, that any witnesses be excluded from the courtroom?

The Referee: Everyone but the parties interested?

Mr. Razeto: Yes, naturally, the parties.

The Referee: Are there any witnesses other than the parties interested?

Mr. Wool: Yes; I have two witnesses.

Mr. Razeto: May we also have a stipulation, Counsel, that Peter C. Scott filed a petition in bankruptcy on December 18, 1953, and was adjudicated bankrupt on December 18, 1953?

The Referee: The record is here, Counsel. The Court will take judicial notice of all the records.

Mr. Razeto: Mrs. Smith.

MRS. NORMA H. SMITH

called as a witness for objecting creditor, Sworn.

The Referee: What is your full name? [2*]

A. Norma H. Smith.

The Referee: Proceed.

Direct Examination

Mr. Razeto: If the Court please, I am now presenting testimony under the specifications of objection to the discharge Ground Two.

Mr. Wool: Which one? You filed two.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mrs. Norma H. Smith.)

Mr. Razeto: No. 2 of our objections.

Mr. Wool: But, you filed two sets of objections.

Mr. Razeto: The last set, the one that was mailed to you on June 14, 1954.

Mr. Wool: I take it you are abandoning the earlier one of the 11th.

Mr. Razeto: That was never filed.

The Referee: We have only one here.

Mr. Razeto: June 14.

The Referee: Filed June 15 here.

Mr. Razeto: That is the one we are proceeding under.

Mr. Wool: I never was advised of it.

Mr. Razeto: You received a copy of this?

Mr. Wool: Yes.

Mr. Razeto: I also want to know for the record: There are no written responses?

The Referee: It is not required.

Mr. Wool: Under the Act, it does not require a written answer. [3]

Q. (By Mr. Razeto): You are Norma Smith, are you not? A. Yes.

Q. And where do you now reside?

A. 1464 Crow Canyon Road, Hayward.

Q. Mrs. Smith, I show you a note dated February 1st.

Mr. Wool: May I see that, counsel?

Mr. Razeto: Surely.

Q. I show you a note for \$5,000.00. Is that the signature of Mr. Peter C. Scott?

(Testimony of Mrs. Norma H. Smith.)

A. Yes, sir; it is.

Q. And is that note payable to you?

A. Yes, sir.

Mr. Razeto: I introduce this note into evidence and would like to read it into the record, for the record in this case.

The Referee: Objecting Creditor's Exhibit No. 1.

(The note, dated February 1, 1945, was admitted in evidence as Objecting Creditor's Exhibit No. 1.)

Mr. Razeto: May we have permission to withdraw it after I read it into the record?

The Referee: Not until after the time for appeal goes by.

Mr. Razeto (Reading): "San Jose, California, February 1st, 1945."

Mr. Wool: Why can't it go in and be deemed read?

Mr. Razeto: I want the record, for the purpose of any appeal, to be complete. [4]

"This flat note hereinafter stated we jointly and severally promise to pay to Norma Smith as joint tenants or order the principal sum of (\$5,000.00) Five Thousand Dollars with interest from date hereof on the amounts of principal sum remaining from time to time unpaid until said principal sum is paid, at the date of (4½%) Four and one-half per cent per annum. Interest payable semi-annually on February 5th and August 5th of each year and

(Testimony of Mrs. Norma H. Smith.)

continuing for a period of (10) ten years. Providing, however, that the whole of the principal sum remaining unpaid shall be paid in full on or before (10) ten years after date. Any or all of the principal sum may be paid at any time during the period of this note without penalty.

“This note is secured by a Deed of Trust bearing even date herewith.”

It is signed, “Peter C. Scott” and “Elizabeth A. Scott.”

Q. Mrs. Smith, did you give to Peter C. Scott and Elizabeth A. Scott \$5,000.00 for this note?

A. Yes, I did.

Q. Mrs. Smith, did you ever receive a Deed of Trust securing this note? A. No, I did not.

Q. Do you know whether there is in existence a Deed of Trust securing this note?

A. Mr. Scott told me there was not. [5]

Q. When was the first time Mr. Scott informed you that his note was not secured by a Deed of Trust? A. October, 1953.

Q. Will you relate the circumstances when he first informed you of that fact?

A. I had gone to San Jose and met Mr. Buckhalter, who has since passed away.

Mr. Wool: Just a minute. I object. Maybe I am anticipating testimony. I was going to object to any discussion with anybody else than Mr. Scott.

Mr. Razeto: So far she just testified she met——

The Referee: There is nothing pending.

Q. (By Mr. Razeto): Proceed.

(Testimony of Mrs. Norma H. Smith.)

A. We met Mr. Scott.

Q. Who do you mean by we?

A. Mr. Buckhalter and I.

Q. The three of you. Is that right?

A. Yes.

Q. Where did you meet Mr. Scott?

A. In front of Cathey Motors in San Jose, on South First Street.

Q. And what was the conversation between you and Mr. Scott in the presence of Mr. Buckhalter?

A. I told him I heard he sold his house. I asked him if that was true and I asked him about the Deed of Trust. Then, he told us in that conversation there had been no Deed of Trust given at any time. He said the money was in escrow and would be paid in about a week's time and he would pay me then, he wanted to pay it in full at that time. That was the first I [6] had known there was no Deed of Trust.

Q. Did he, at that time, assure you you would be paid out of an escrow? A. Yes; he did.

Mr. Wool: Just a minute. Counsel is asking leading and suggestive questions.

The Referee: That is true.

Mr. Razeto: I am repeating her testimony, your Honor, that he said she would be paid out of the escrow. I am just repeating her answer. I am not suggesting.

The Referee: I have not said you were.

Q. (By Mr. Razeto): Mrs. Smith, did he tell you where the escrow was?

(Testimony of Mrs. Norma H. Smith.)

A. I think he said The California Pacific Title. Afterwards, Mr. Buckhalter told me.

Mr. Razeto: Not what Mr. Buckhalter said.

The Referee: Was Mr. Scott there?

A. The three of us.

Q. When he told you about the escrow?

A. Yes; we were all present, all sitting in Mr. Scott's car at that time.

The Referee: If he was present, she can answer.

Q. (By Mr. Razeto): Did you ever receive any money from this escrow? A. No; I did not.

Q. Have you ever been paid on this note?

A. No; I have not. [7]

Mr. Razeto: May I have the schedules, your Honor? You are familiar with this?

Mr. Wool: Yes.

Q. (By Mr. Razeto): Mrs. Smith, I show you the creditors' schedule filed on December 18, 1953, Schedule A-3, entitled "Creditors Whose Claims Are Unsecured." The third item is: Norma Smith, 1464 Crow Canyon Road, R.F.D. Hayward, California; Note \$10,615.00. That is signed by Peter C. Scott. Now, does that include the \$5,000.00 note that is dated February 1, 1945? A. Yes, sir.

Q. Mrs. Smith, going back now to February 1st, 1945, when this note was executed by Mr. Scott and given you in exchange for the \$5,000.00, from whom did you receive this note?

A. From Mr. Scott.

Q. Who prepared it? Do you know?

(Testimony of Mrs. Norma H. Smith.)

A. I don't know who prepared it. I presume Mr. Scott. The note there is the way it came to me.

Q. Handed to you by Mr. Scott?

A. Handed to me by Mr. Scott.

Mr. Wool: Did you say Mr. or Mrs. Scott?

A. Mr. Scott.

The Referee: Mr. Scott.

Q. (By Mr. Razeto): Mrs. Smith, prior to the lending to Mr. Scott of the \$5,000.00 in question, had he discussed the matter of security and a Deed of Trust with you?

Mr. Wool: Just a minute now. That is leading and [8] suggestive.

Mr. Razeto: I don't know, your Honor.

The Referee: Ask her if there was any conversation at the time he gave the note.

Q. (By Mr. Razeto): Was there any conversation?
A. It was understood——

Q. No, no. What conversation? What did he say to you about the note?

A. It would be secured by a Deed of Trust.

Q. What property?

A. A mortgage on the house, 1520 Hicks Avenue, San Jose.

Q. Did he give you any details or particulars as to why he wanted the money from you?

A. In the conversation, he said that they were refinancing their home and that I might as well have the interest as paying the bank or someone else. I don't remember exactly just what it was.

(Testimony of Mrs. Norma H. Smith.)

Q. What was your relationship to Mr. and Mrs. Scott at that time, February 1, 1945?

A. Very, very close; about the closest friends I had.

Q. At that time were you married or a widow?

A. A widow.

Q. Has he ever made any payment of interest under the note to you? A. Yes.

Q. How many payments were made?

A. Payments of interest were made twice a year up until—I think the last one was in 1952. I don't remember just exactly. [9]

Q. During this period, or at any time when he made payments to you, did he tell you the note was not secured by a Deed of Trust?

A. No; he did not.

Q. Would you have loaned him this money if you knew it had not been secured by a Deed of Trust?

A. No; I would not have, at that particular time.

Q. Did you believe him when he told you it was secured by a Deed of Trust?

A. Yes; I did. I had no reason to believe otherwise.

Q. Mrs. Smith, when Mr. Scott supposedly sold his home to his present wife on February 13, 1953—

Mr. Wool: Now, just a moment. I am going to object to that question for two reasons: It assumes

(Testimony of Mrs. Norma H. Smith.)

a fact not in evidence and it also carries with it an innuendo which certainly is objectionable.

Mr. Razeto: I will withdraw the question, your Honor.

The Referee: Very well.

Q. (By Mr. Razeto): Mrs. Smith, did Mr. Scott at any time in January, 1953, inform you that he had sold or transferred the house?

A. No; he did not.

Q. Did he pay you any money at that time?

A. No; he did not.

Q. Calling your attention to some time in August, 1953, did you have any conversations with Mr. Scott regarding your loan? [10]

A. Yes; I did. I went to San Jose just before I went on vacation, the last of the month. I asked him to put the two notes on my mortgage on the house. He said he would look it up; he did not know whether the papers were at the house or the bank. He would take care of it.

Q. He did not tell you at that time that it was not secured by a Deed of Trust?

A. No; he did not; nor that the house had been sold.

Mr. Razeto: That is all at this time.

The Referee: Cross-examine?

Mr. Wool: Are you proceeding on the other specification?

Mr. Razeto: I will recall her.

Mr. Wool: At this moment, at this time, I move to strike out all the testimony on Point No. 2 on these specifications for the following reasons:

(Testimony of Mrs. Norma H. Smith.)

In the first place, in order to be sufficient to bar a discharge, the statement must be in writing and it must be a statement, a financial statement, citing in *re Morgan*, 267 Fed. 959, quoting an extract from that:

“Such statement must be a financial statement as distinguished from a mere representation.”

Then, in *re Lundberg*, 272 Fed. 107, the Court says—in that case there was a note given to the effect, reciting that there was a lien on certain real property. The court in that case said: [11]

“But there is a grave question as to whether the statement written on the note, even if false, came within the statute.”

The Circuit Court of Appeals in the Second Circuit recently said—it is plain that the intention of Congress was not to extend the statute to all cases of false written statements where credit happens to be given, the thought being to confine the statute to cases where the decision to give credit was induced by the false statement—“Such statement must be a financial statement as distinguished from a mere misrepresentation.”

In *re Current*, 63 Fed. 2nd, 640. The lower court sustained the objections in a similar situation as did also the District Court. On appeal, the Circuit Court granted the discharge. The section reads, “A materially false statement in writing respecting his financial condition.” This subsection was amended May 27, 1926, and, among other changes, the words were added: “Respecting his financial

(Testimony of Mrs. Norma H. Smith.)

condition.” Thus, he obtained credit by making a materially false statement in writing when he presented to the loaner a forged promissory note. The Court said: “Was it, however, with respect to his financial condition”——

“The presentation of a note apparently signed by a responsible third party would, we think, hardly be in reference to the bankrupt’s financial condition, as that phrase is here used. It is a representation that [12] the bankrupt enjoys the backing of a responsible party, which fact indicates the existence of credit. However, the phrase ‘respecting his financial condition’ limits and restricts the false statement which may defeat the discharge. In short, the false statement must be in respect to the bankrupt’s financial condition. Even before the amendment to this subdivision, the Courts had given the term ‘materially false statement’ a narrow meaning. (Citing cases.)

“Moreover, Subdivision (2) of this Section (Section 14b, of the Act, 11 USCA, Sec. 32 (b) (2)) used the same phrase, ‘financial condition,’ in such a way as to leave no room for doubt as to its meaning.”

This is a 14 Federal Supplement case.

And, in re Hudson, 262 Fed. 778—these are District Court cases, however——

Mr. Razeto: May I present my points and authorities on the same subject, your Honor?

The Referee: Wait until he gets through.

(Testimony of Mrs. Norma H. Smith.)

Mr. Razeto: Sorry. I thought he was finished. Sorry.

Mr. Wool: In *Levy vs. Industrial Finance Corporation*, 276 U. S., 281, Judge Holmes said: "The amendment of 1926 adding the words 'respecting his financial condition' serves to limit this bar to a discharge more narrowly."

Then, in *re Hudson*, 262 Fed. 778, the one I [13] just quoted—this is a District Court case—the Court held there that the statute was never intended by Congress to bar a discharge upon the sort of written misrepresentation which is presented here. Congress intended the language of the statute to be construed as a merchant uses the term. The Court said: "A loan upon given security is not ordinarily contemplated when merchants speak of obtaining money, goods, or property on credit."

The statute contemplates a statement of the bankrupt's financial condition.

6 Am. Jurisprudence, 968, Sec. 701 of the title on bankruptcy:

"The statement to be a bar must be a statement in writing with respect to the financial condition."

I submit, therefore, that the testimony should be stricken.

Mr. Razeto: If the Court pleases, we submit the following points and authorities in support of our position. What we are relying on is Section 14(c) of the Bankruptcy Act, which reads as follows:

"The court shall grant the discharge unless satisfied that the bankrupt has—(3) obtained money

(Testimony of Mrs. Norma H. Smith.)

or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a [14] materially false statement in writing respecting his financial condition.”

This section has come under interpretation by innumerable cases and the nearest case to the one before the Court, and I believe the complete answer to this case, is a case not cited by Counsel, in *re Powell*, 22 Fed. 2nd, 239. In that case, your Honor, the bankrupt obtained money by means of a false chattel mortgage. There was no chattel mortgage actually existing, but he represented in writing to the creditor that there was a chattel mortgage. The Court held that was a materially false statement in writing sufficient to bar the discharge, that a false chattel mortgage, being in writing, fell within the definition, just as does a false statement of assets generally. Bad check cases were distinguished. The forgery case which Counsel cited was distinguished. It was held that a check was not a statement, did not say anything about finances, and that same case, in *re Powell*, overrules the case cited by Counsel, in *re Hudson*. The prior case—I have that also—that was in *re Hudson*, 262 Fed. 778, has been overruled specifically by in *re Powell* in so many words.

Also, the later interpretations of the application of this section dealing with obtaining money by false representations in writing of the financial condition of the bankrupt has been stated to be as follows:

(Testimony of Mrs. Norma H. Smith.)

“A materially false statement in writing barring a bankrupt’s discharge cannot be confined [15] to a financial statement, but may include a statement for the purpose of obtaining money or property on credit.”

Robinson vs. Williston, 266 Fed. 970.

Mr. Wool: What is the type of case? What was before the Court?

Mr. Razeto: That was a worthless check case, your Honor. Yes; that was a worthless check case, your Honor.

The Referee: Wait a minute. A worthless check case in what kind of case?

Mr. Razeto: I have it now. This Robinson case has an interesting history. It was a worthless check case. Originally the lower court held that a check made without any funds was sufficient to bar the discharge. That case was reversed on appeal, and in that case it held that a worthless check was not a statement in writing, and, therefore, overruled the lower court. It was in the last court where the statement I have read was made. The Appellate Court agreed with counsel for the objector that a false statement was not confined to a financial statement as commonly understood, of assets and liabilities, but may include any statement as to the financial condition of the bankrupt. And that case was further carried through in *in re Powell*. By the way, this case established that bad checks are not grounds for barring the discharge, which was stated in the *in re Powell* case. [16]

(Testimony of Mrs. Norma H. Smith.)

Another case similar to ours is the case of *Mau vs. Sampsell*, 185 Fed. (2nd) 400. In that case the debtor wrote a letter, the bankrupt-debtor wrote a letter stating that an existing escrow would soon net him enough cash to pay the debt in full. It later developed there never was in existence any escrow at all; the escrow was not there whatsoever. They held that was sufficient ground for denying the debtor a discharge.

In view, your Honor, of these two late cases——

The Referee: There is a direct reference to his financial condition.

Mr. Razeto: The existence of an escrow.

The Referee: It is not the existence of an escrow. The man says there is an escrow out of which there will be sufficient to pay the creditor all this money.

Mr. Razeto: When a man says it is secured by a Deed of Trust, it implies there is a source from which it can be paid, too, your Honor.

The Referee: I cannot imply something. There is a direct statement respecting the man's financial condition. This does not.

Mr. Razeto: The chattel mortgage case does, does it not?

The Referee: I have not read that case.

Mr. Wool: I expect there is a statement that there was a mortgage on the man's home. [17]

Mr. Razeto: The Deed of Trust was.

Mr. Wool: That is the difference; there is no Deed of Trust.

(Testimony of Mrs. Norma H. Smith.)

Mr. Razeto: That is the reason we are here. Anyway, we submit these as our authorities.

The Referee: Very well. I will reserve my ruling. Proceed with your case in chief. You can cross-examine without waiving any rights.

Mr. Wool: I certainly missed this in re Powell case or I would certainly have read it and presented it to your Honor. I had to present all the applicable law whether it is for me or against me. I think these others don't apply.

Cross-Examination

By Mr. Wool:

Q. How did you pay Mr. Scott this money, Mrs. Smith? The \$5,000.00. A. By a check.

Q. And when did you give the check to him, do you recall?

A. No; I don't recall. It was 1945, some time in February, 1945.

Q. And when did you get the note?

A. Just about the same time.

Q. Was it before or after you gave him the check? A. After I gave him the check.

Q. You got the note after you gave the check?

A. That is right.

Q. How long after?

A. That, I don't remember. [18]

Q. And now I give you this pencil; now, you take the pencil; now give it back. Was it that kind of a transaction? A. No.

Q. Or, did some days elapse?

(Testimony of Mrs. Norma H. Smith.)

A. I think several days elapsed.

Q. And where was the note given to you?

A. In San Jose.

Q. You were down visiting the Scotts at that time? A. Yes.

Q. Where was the check given to Mr. Scott?

A. Also in San Jose.

Q. Now, I believe that you said you received the note from Mr. Scott? A. Yes.

Q. Mr. Scott gave you the note?

A. Yes; I believe so.

Q. Now, did you give Mr. or Mrs. Scott the check?

A. They were both there. I don't remember. I took it down on a week end and gave it to them. They were both there at the same time.

Q. That was in 1945? A. Yes.

Q. Now, I believe you testified here earlier at this hearing that you were, that you visited back and forth with the Scotts? A. That is right.

Q. For a number of years? A. Yes.

Q. Now, is Mrs. Elizabeth Scott living or dead?

A. Not living, sir.

Q. Do you know when she died?

A. January, 1952.

Q. And you visited with the Scotts?

A. Yes. [19]

Q. They would visit you and you visited them?

A. Yes.

Q. And was the note ever discussed at any time of these meetings from 1945 to some time in 1952?

(Testimony of Mrs. Norma H. Smith.)

A. No.

Q. It was never discussed? Do you know, of your own knowledge, in what business Mr. Scott was engaged at that time?

A. The used car business.

Q. How frequently would you see the Scotts?

A. I sometimes would be down twice a week. Mrs. Scott was teaching at the University. I used to go down week ends. When she was teaching during summer school, she would stay with us in Alameda.

Q. Following, that is, immediately following Mrs. Scott's death, did you discuss with Mr. Scott anything about his financial affairs? A. No.

Q. Even though he was owing you money?

A. No; I did not discuss anything.

Q. You did not discuss——

Mr. Razeto: Let her finish.

A. I did not think it was necessary. I had a mortgage on the house, so I thought—the interest was paid, so, I had no occasion to.

Q. (By Mr. Wool): You did not inquire?

A. No. I did not think it necessary.

Mr. Wool: That is all. [20]

Redirect Examination

By Mr. Razeto:

Q. Prior to the lending of the money to Mr. Scott, had you been told the note was secured by a Deed of Trust, had you not? A. Yes.

Q. Did he give you a note reading——

(Testimony of Mrs. Norma H. Smith.)

Mr. Wool: I object to that. It is certainly objectionable. It is incompetent, irrelevant and immaterial; certainly not a representation as contemplated by the statute barring a discharge.

Mr. Razeto: Your Honor, I was asking on redirect as to what was said between Mr. Scott and Mrs. Smith at the time the money was loaned and what actually took place. I think it is a perfectly proper question and very material to the decision.

The Referee: Just a minute. Haven't you already presented that?

Mr. Razeto: Just in order to correct any misinterpretation of any other statement made here. That is all.

(Witness excused.)

Mr. Razeto: Mr. Scott.

PETER COTTRELL SCOTT

called as a witness for the Objecting Creditor,
Sworn.

The Referee: Your name is Peter Cottrell Scott?

A. Yes, sir. [21]

Direct Examination

By Mr. Razeto:

Q. Mr. Scott, where do you reside now?

A. 2015 Ray Drive, Burlingame, California.

Q. Mr. Scott, did you own, on February 1st, 1945, a house at 1520 Hicks Avenue, San Jose?

A. Yes.

(Testimony of Peter Cottrell Scott.)

Mr. Wool: What was the date?

Mr. Razeto: About February 1st, 1945.

The Witness: Yes, sir.

Q. (By Mr. Razeto): And at that time that house had a mortgage against it. Is that right?

A. Yes, sir.

Q. In whose name was the mortgage then?

A. A. J. De Smet.

Q. And what was the balance due at that time to De Smet?

A. I am not positive, but approximately \$6,000.00.

Q. And their Deed of Trust was reconveyed to you on March 24, 1945. Isn't that true?

A. Somewhere in there.

Q. And after that reconveyance on March 24, 1945, did you again encumber this house?

A. At a later date, yes, sir.

Q. Did you give at that time to Mrs. Smith a Deed of Trust on the house? A. Yes, sir.

Q. Did you give Mrs. Smith——

Mr. Wool: Just a minute, Counsel.

The Witness: I misunderstood you. I thought you said De Smet. [22]

Q. (By Mr. Razeto): No. Did you give to Mrs. Smith on or about March, 1945. when you paid off the De Smets, a Deed of Trust in her name?

Mr. Wool: Just a minute. I am going to object to that as incompetent, irrelevant and immaterial. This is something that occurred following the execution of this note, the execution and delivery of the

(Testimony of Peter Cottrell Scott.)

note, and certainly not material as to the question of any kind of a statement which would bar the discharge of this bankrupt.

Mr. Razeto: The question, your Honor, is whether he gave a Deed of Trust or did not give a Deed of Trust to Mrs. Smith.

The Referee: That was not the question you asked him.

Mr. Razeto: I asked if he gave a Deed of Trust to Mrs. Smith in March, 1945, on the house on Hicks Avenue, San Jose.

Mr. Wool: It is immaterial.

The Referee: The note is dated February 1st.

Mr. Razeto: At that time, he testified he removed the old mortgage. I was wondering if at that time he gave a Deed of Trust.

The Referee: The objection is sustained.

Mr. Razeto: All right.

Q. Mr. Scott, on about February 1st, 1945, when Mrs. Smith loaned you the \$5,000.00, was your house on Hicks Avenue [23] encumbered? A. Yes.

Q. By whom? A. A. J. De Smet.

Q. How long were they the persons who held the Deed of Trust on your house? How long a period after that did they remain on the house as holders of the Deed of Trust?

Mr. Wool: The same objection.

The Referee: The same ruling.

Mr. Razeto: I want to show, your Honor, that this house was always encumbered and he was giv-

(Testimony of Peter Cottrell Scott.)

ing a note in writing that it was encumbered by someone else.

Mr. Wool: There was no representation that it was to be a First Deed of Trust.

Mr. Razeto: That answers the whole question, your Honor.

The Referee: If it was after this date, what difference would it make?

Mr. Razeto: He could have corrected that by giving her the Deed of Trust.

The Referee: The objection is sustained. Everything must happen on or prior to this date if it is at all applicable.

Mr. Razeto: He states it is secured by a Deed of Trust of even date herewith.

Q. There was no Deed of Trust of even date herewith, was there, Mr. Scott? Will you answer that? When you wrote this note stating this is secured by a Deed of Trust of even date herewith, there was no Deed of Trust? [24] A. No.

Q. Why did you sign the note, then?

A. This note is a note that I copied from a note that I had in my possession; I mean, among some papers that I had, and it had this particular type of note on it and that is what I copied and later gave to Mrs. Smith.

Q. Mr. Scott, you typed this note yourself. Is that right? A. Yes, sir.

Q. From the first word to the last word. Is that right? A. That is right.

Q. You wrote it off and typed it, did you not?

(Testimony of Peter Cottrell Scott.)

A. I think so; yes.

Q. Did you understand what you had written, Mr. Scott? A. I believe I understood.

Q. Did you own any other property than the Hicks Avenue home, other real property than the Hicks Avenue home at the time the note was executed by you? A. Yes.

Q. What other property did you own at that time?

A. A lot adjacent to the Hicks Avenue property.

Q. Was that under a separate Deed or the same Deed as your Hicks Avenue property?

A. A separate Deed.

Q. Did you ever give Mrs. Smith a Deed of Trust on that lot? A. No.

Q. Was that lot also encumbered on February 1, 1945?

A. I am not positive. I purchased it and after due time, paid it, over a period of time. [25]

Q. Do you or do you not know whether you gave a Deed of Trust to Mrs. Smith on the adjacent lot?

A. I did not give Mrs. Smith a Deed of Trust at any time, Counsel.

Mr. Razeto: Thank you.

Now, if the Court please, referring to Specification No. 1(a) and (b) of our Specifications—

Q. I show you, Mr. Scott, a Deed for identification. Is that the deed signed by you?

The Referee: That is a photostatic copy.

(Testimony of Peter Cottrell Scott.)

Mr. Razeto: Pardon me. That is a photostatic copy of the Deed, yes, your Honor.

The Witness: Yes, sir. This is my signature.

Mr. Razeto: I would like to offer it in evidence.

Mr. Wool: On what?

Mr. Razeto: Under our Objection 1(a). It reads as follows——

Mr. Wool: I have no objection to its being offered in evidence and being read so long as it is confined to Specification 1 (a).

The Referee: Very well:

(Photo of Deed admitted in evidence as Obj.
Cred. Ex. No. 2.)

Mr. Razeto: It says:

“Application 263054, Escrow 854702. Grant Deed
Individual.

“I, Peter C. Scott, a single man, the First Party, hereby grant to Barbara D. Stevens, a single woman, the Second Party, all of the real [26] property situated in the City of San Jose, County of Santa Clara, State of California, described as follows:

“Lot Twenty (20) in Block Two (2) as laid down, designated and delineated upon that certain Map entitled ‘Map of Cherry Park’ recorded October 15, 1923, in the Office of the County Recorder of the County of Santa Clara, State of California, in Book R of Maps, Page 42.

“Witness my hand this 13th of January, 1953.

“PETER C. SCOTT.

(Testimony of Peter Cottrell Scott.)

“State of California,

“County of Alameda—ss.

“On this 13th day of January, 1953”——

Mr. Wool: Just a minute. I don’t have a Notary’s commission in Alameda County.

Mr. Razeto: May I proceed?

Mr. Wool: You may correct that to Santa Clara County. I am just correcting the record for you; that is all.

Mr. Razeto: Thank you, sir.

“State of California,

“County of Santa Clara—ss.

“On this 13th day of January, 1953, before me, Fred A. Wool, a Notary Public in and for said County and State, personally appeared Peter C. Scott, being the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

“FRED A. WOOL,

“Notary Public.” [27]

“FRED A. WOOL,

“Notary Public.”

This Deed of Trust——

Mr. Wool: Deed, Counsel.

Mr. Razeto: Excuse me. This Deed was recorded January 26, at 1:30 o’clock p.m., 1953 and bears revenue stamps of \$17.60.

Q. Is this the Deed of Trust——

Mr. Wool: Deed, Counsel.

Mr. Razeto: Pardon me.

(Testimony of Peter Cottrell Scott.)

Q. Is the Deed, Mr. Scott, by which you purportedly conveyed title to Barbara Stevens?

Mr. Wool: Just a moment. I object to that innuendo and conclusion.

Mr. Razeto: I am very sorry if you are sensitive about my question. If you have an objection, make a legal objection on some ground, not innuendo.

Mr. Wool: I am objecting to your innuendos, Counsel, "By which you purported to convey" and all that.

Mr. Razeto: It is our position, your Honor, that there was never a bona fide sale or transfer of this property to Barbara Stevens. Therefore, I am referring to it as an alleged transfer. You can have the pleasure of proving otherwise when I am through.

Mr. Wool: If you want to use the word "alleged," that is perfectly all right. [28]

Mr. Razeto: All right.

Q. By this Deed, you alleged, or tried to transfer your title to the Hicks Avenue property to Barbara Stevens. Is that right?

A. I did transfer it.

Q. That was on January 13, 1953, when you signed this Deed?

A. That is right.

Q. Now, you married Barbara Stevens the next day, January 14. Is that true?

A. That is right.

Q. What arrangements did you make with her on January 13, regarding the value of this house, or the proceeds from this house?

(Testimony of Peter Cottrell Scott.)

Mr. Wool: I think that question is misleading and for that reason I am going to object to it.

The Referee: What do you mean by the proceeds of this house?

Mr. Wool: It is a multiple question and assumes facts not in evidence.

Mr. Razeto: Very well.

The Referee: Reframe the question, Counsel.

Mr. Razeto: Yes, I will.

Q. When you executed this Deed in the office of your attorney, Fred A. Wool, on January 13, 1953, was Mrs. Stevens with you at that time?

A. Yes, sir.

Q. Were the three of you, you, Mrs. Stevens and Mr. Wool there? [29] Is that right?

A. That is right.

Q. What was the price, the consideration for this house? A. \$16,000.00.

Q. And she was to pay \$16,000.00 in cash. Is that right? A. That is right.

Q. And this was deposited in escrow, is that right, the \$16,000.00? A. Yes.

Q. Did you at that time inform Mrs. Stevens or Mr. Wool that you had promised a Deed of Trust on this house to Mrs. Smith? A. No.

Q. Did you at that time give any instructions to the title company to pay out of the \$16,000.00, \$5,000.00 to Mrs. Smith? A. No.

Q. Who were paid from the proceeds of that \$16,000.00, do you know? A. Yes.

(Testimony of Peter Cottrell Scott.)

Q. Who? A. A. J. De Smet.

Mr. Wool: We have the title report.

Mr. Razeto: Let the witness answer.

A. A. J. De Smet.

Q. (By Mr. Razeto): In other words, you owed De Smet \$6,000.00 on one note and \$4,000.00 on another note and you paid that off from the proceeds from Mrs. Stevens. Is that right?

A. I paid \$10,500.00 to A. J. De Smet.

Q. And that went on record at the same time the Deed went on record, January 26, 1953, which was in the week after you [30] married Mrs. Stevens. Is that right? A. I assume that is right.

Q. Did you have any other creditors on January 13, 1953, other than Mrs. Smith? A. Yes.

Q. Were they paid at that time?

The Referee: What is the competency of that?

Mr. Razeto: He was insolvent at the time.

The Referee: \$16,000.00 was paid for this.

Mr. Razeto: Ten of which went to De Smet and \$5,500.00 only was surplus.

The Referee: It doesn't make any difference. The transfer is good, isn't it?

Mr. Razeto: I am not talking of the transfer, your Honor. I am showing that this man was insolvent when he transferred property within twelve months of the filing of the petition for discharge.

Mr. Wool: I think Counsel is mistaken on his law, because if the transfer is for a good and valuable consideration——

(Testimony of Peter Cottrell Scott.)

The Referee: Sure. Valuable consideration was paid here.

Mr. Razeto: May I cite some authorities to the Court?

The Referee: Hand them in later.

Mr. Razeto: I do have authorities to the effect that transfers of this kind, your Honor, where a man transfers [31] to his mother-in-law, the Court held it was not a fair consideration. I will show later——

The Referee: Can you show that the value of the place was much more than that?

Mr. Razeto: I will in a minute. Eight months later it was \$18,000.00.

The Referee: That would not make any difference eighteen months later.

Mr. Razeto: Eight months.

The Referee: Even one month.

Mr. Razeto: This woman——

The Referee: We cannot waste time. The transfer was good. I am going to so hold.

Mr. Razeto: I am going to introduce the last Deed from Barbara Stevens, then Barbara Scott, to the——

The Referee: I don't see what that has to do with this. He says he did not give her a Deed of Trust. Now, if you have anything, you have it there. If you have not, all this does not make a particle of difference.

Mr. Razeto: May we introduce this?

The Referee: Surely.

Mr. Razeto: I want the record complete on this.

(Testimony of Peter Cottrell Scott.)

The Referee: There is no objection to introducing it, but I am not going to listen to something at this time that you can put in afterwards by way of a brief if you want to. [32]

Mr. Razeto: This is a Grant Deed in Joint Tenancy. "Barbara B. Stevens does hereby grant——."

Mr. Wool: Just a moment. That has not been introduced and I am now objecting to the introduction of that.

The Referee: I cannot see the competency of it at all.

Mr. Razeto: I want to show, Your Honor, that within twelve months before the filing of the petition in bankruptcy, two people deeded to each other and then transferred to third parties for about \$2,000.00 more.

The Referee: I would not care if it was \$10,000.00 at this time. It would not make any difference to me. You would have to show the value of that particular place at that time, that it was worth more. Even then, it is a difference of opinion.

Mr. Razeto: May I complete this, Your Honor?

The Referee: He is objecting to it and I am going to sustain the objection.

Mr. Razeto: May the record show that I am opposing the ruling of the Court?

Mr. Wool: We will so stipulate.

The Referee: You may take an exception.

Mr. Razeto: Under the Federal Rules, do I have to take an exception?

(Testimony of Peter Cottrell Scott.)

The Referee: You don't have to. Make an objection, I will rule on it, and then you can take whatever action you [33] want.

Mr. Razeto: I am going to Specification 1(b), the transfer of the automobile.

Q. Mr. Scott, within months prior to the filing of the petition in bankruptcy, to wit, in July, 1953, you owned a 1952 Cadillac. Is that right?

A. No, sir.

Q. What? A. No.

Q. Who owned it at that time?

A. I did not have a 1950 Cadillac.

Q. A 1952 Cadillac.

A. Or a 1952 Cadillac either.

Q. You testified in court——

Mr. Wool: Just a moment, Counsel. If you are going to examine the witness on any former testimony, read him the question and the answer.

Mr. Razeto: Very true.

The Referee: What are you trying to do, impeach your own witness?

Mr. Razeto: I am going to show he has testified that he owned a 1952 Cadillac in 1953.

The Referee: He is your witness, sir.

Mr. Razeto: Very well; we will impeach him.

The Referee: Well, you won't

Mr. Razeto: I want to find by the testimony today.

Q. What is your present testimony, that you did not own a 1953, a 1952 Cadillac? Is that right? [34] A. No.

(Testimony of Peter Cottrell Scott.)

Q. What Cadillac did you own in July, 1953?

A. A 1948 Cadillac, Sixty-two sedan.

Mr. Wool: Counsel, you are mistaken. That number they call the model for the year. That is typical of a lot of things done here.

Mr. Razeto: Of course, I am not an automobile salesman. I don't know.

Mr. Wool: Neither am I.

Q. (By Mr. Razeto): You have testified here, or we have testimony from you that you did own a 1952 Cadillac in 1953.

A. I did not testify that I owned a 1952.

Q. What type of automobile did you transfer to your wife in July, 1953?

A. A 1948 Cadillac, Model Sixty-two sedan.

Q. Model what? A. Sixty-two.

Q. You transferred that to Mrs. Scott in July, 1953? A. Right.

Q. And she still has that automobile, has she?

A. Yes.

Q. You are sure it is a 1948, not a 1953 Cadillac?

A. Yes, sir.

Q. And the consideration for the automobile was how much?

A. \$1,098.00, \$1,100.00 was what she paid for it.

Q. What was the blue book value of the 1948 Cadillac in July, 1953?

A. I don't have a July book. I have the [35] next book.

Mr. Wool: By the next book, what do you mean?

(Testimony of Peter Cottrell Scott.)

A. There are six issues a year. They go in sequence of two months, Your Honor. A 1948 Cadillac, Model Sixty-two, four door sedan is listed on the wholesale market at \$1,000.00 and \$1,300.00 on the retail side.

Mr. Razeto: May I see it? A. Yes.

Mr. Wool: What particular period of time is that?

A. This is the following month of 1953.

Mr. Razeto: What month is that?

A. September and October. It is the next issue.

Q. Do you have the book preceding that?

A. Sorry, I do not have it. You hardly ever keep these old ones. I just went down and borrowed this from a dealer for this purpose.

The Referee: Have you one, Mr. Walsh?

Mr. Walsh: I have one in my office. I will be glad to produce it.

The Witness: The difference in price is negligible.

Q. (By Mr. Razeto): How much would you say, Mr. Scott? A. Possibly \$50.00.

Q. It would depreciate at the rate of \$50.00 a month?

A. Over two months. As a matter of fact, sometimes a couple of hundred dollars over the weeks. I think you could substantiate that. [36]

Mr. Razeto: Your Honor, if it was a 1948 Cadillac, it would not be over the value. My impression was the former testimony was a 1952, not a 1948.

Mr. Wool: Are you dismissing that, Counsel?

(Testimony of Peter Cottrell Scott.)

Mr. Razeto: No, I am just making the statement for the record. I want to check to see if this is a 1948.

Q. You have the car here, have you?

A. No.

Q. You sold it?

A. No. I haven't any ownership in it.

Q. Is your wife with you?

A. She does not have that car with her. I don't think she has the automobile in her possession.

The Referee: Take a ten minute recess at this time.

(Recess.)

The Referee: You may proceed.

Q. (By Mr. Razeto): Mr. Scott, on December 18, 1953, when you filed the petition in bankruptcy, you had in your possession about \$615.00 of trust funds of Mrs. Smith's from the sale of her automobile, did you not?

A. Mrs. Smith had a credit on my books for \$615.00 for the sale of a 1941 Buick automobile.

Q. In other words, you were her agent for the sale of her automobile and had recovered \$615.00 for the sale of same, did you not? A. Yes, sir.

Q. And you did not turn that money over to her, did you? [37] A. No, sir.

Q. Did you account to her for that money? I mean, did you render her a written statement of how much you sold the car for? A. Verbal.

Mr. Razeto: That is all.

The Referee: Cross-examine?

(Testimony of Peter Cottrell Scott.)

Cross-Examination

By Mr. Wool:

Q. Mr. Scott, do you recall the exact amount of the disbursements in connection with the sale of the Hicks Avenue property, which you made to Barbara D. Stevens in January, 1953?

A. Approximately, sir.

Q. Do you know, can you recall the balance of money which you received?

A. Yes, sir. \$5,300.00 either seventeen or seventy-five, something like that. \$5,300.00 and some-odd dollars.

Q. You have already testified that you paid to Mr. A. J. De Smet, or had paid out of the escrow, \$10,500.00?

A. Yes, sir.

Q. The difference between that and these two sums you mentioned and the \$16,000.00 was used for what purpose?

A. I deposited \$5,000.00 in my account in the bank and used it in my business.

Q. That is your \$5,375.90?

A. Yes, sir.

Q. Were there or were there not certain expenses in connection [38] with the sale?

A. There was a title bond, I recollect.

Q. You don't recall that?

A. The amounts, whatever the title charge was for the title insurance and that sort of thing was taken from it. Revenue stamps. I don't have.

Q. Would this refresh your memory?

(Testimony of Peter Cottrell Scott.)

A. Thank you, sir. The sale price was \$16,000.00. Demand of A. J. De Smet, \$10,500.00, recording Deed and Reconveyance, \$4.00; title fee, \$99.00; Revenue stamps, \$17.60; trustee fee, \$3.50; balance due \$5,375.90.

Q. Now, you state you deposited that \$5,000.00 in your account? A. Yes, sir.

Q. What account was that?

A. My business account.

Q. Did you have any other account?

A. No, sir.

Q. What became of the \$375.90?

A. I took that for expense money, to live on.

Mr. Wool: I offer this in evidence if there is no objection.

Mr. Razeto: No, objection.

The Referee: Bankrupt's No. 1.

(Document headed "San Jose Abstract & Title Insurance Co.," was admitted in evidence as Bankrupt's Exhibit No. 1.)

Q. (By Mr. Wool): With reference to the 1948 Cadillac, how long had you had that on the lot, Mr. Scott?

A. Approximately a year and a half. [39]

Q. And was that clear or was it encumbered in any way?

A. It was floored with the American Trust Company on the regular flooring plan.

The Referee: Trust receipt?

The Witness: Trust receipt, yes, sir.

(Testimony of Peter Cottrell Scott.)

Q. (By Mr. Wool): And there was some money due under that? A. \$1,050.00.

Q. And?

A. Or thereabouts, maybe forty-six or forty-seven; I am not positive.

Q. Had there been any—had the bank been urging you or had they been attempting to collect this flooring on this?

A. Yes. It is out of the ordinary to carry a car that long and they were making a demand on me to reduce my flooring at the time on that.

Q. And was or was not the value of the automobile depreciating?

A. Constantly, every month, as shown by the book.

Q. You had attempted over this period of time to sell it? A. Yes, sir.

Q. Then, you sold it to Mrs. Scott?

A. Yes, sir.

Q. Did you believe that to be a fair value for that automobile?

A. It was much better than I received from later models that I sold under duress.

Q. Now, with reference—oh——

By the way, did you furnish or transfer or place at the disposal of Barbara Stevens any part of that \$16,000.00 which she paid for the Hicks Avenue property? [40] A. No, sir.

Q. And did you place at the disposal of Mrs. Scott——

Mr. Razeto: I object to that as leading and sug-

(Testimony of Peter Cottrell Scott.)

gestive, Your Honor.

Mr. Wool: I am cross-examining.

The Referee: It is cross-examination.

Mr. Wool: Did you place at the disposal of Mrs. Scott, give her or lend her, credit her in any way with any part of the \$1,098.00 which was paid for the 1948 Cadillac automobile?

A. No, sir. The major portion of that was given to the bank.

Q. Well, what you received for it, the amount that she paid, have you given her any portion of the amount she paid for that? A. No, sir.

Q. Calling your attention to the \$615.00. It is with respect to the 1948 Buick? A. 1941.

Q. Will you state to His Honor all of the transaction you had with Mrs. Smith with respect to this 1948 Buick. A. 1941.

Q. 1941 Buick; pardon.

A. Mrs. Smith gave me the car to sell for her and I, in turn, sold the automobile, took a trade-in, sold the trade-in. The final disposition of the automobile was \$615.00, which we set up on my books as a credit to Mrs. Smith. In discussing it, I told Mrs. Smith what we had received for the automobile. Sometime later in the year, I gave Mrs. Smith a check for [41] sixty-some-odd dollars as ten per cent interest on this amount of money, which she received, and it continued on my books as a credit to Mrs. Smith, which I used in my business. At no

(Testimony of Peter Cottrell Scott.)

time did I pay Mrs. Smith any of the principle of this amount received for this automobile.

Q. Did you discuss with her at any time the payment of it?

Mr. Razeto: May we have a foundation for any conversation regarding this transaction, Counsel?

Mr. Wool: I just asked if he discussed it at any time with Mrs. Smith.

A. At various times. And at one time Mrs. Smith said, "I don't need——"

Mr. Razeto: May we have a foundation? I object unless you lay a foundation to that particular conversation.

The Referee: Do you remember when it was?

A. Sometime during 1952.

Q. Where? A. At my house.

Q. She was with you? A. Yes.

Q. Was anybody else present besides Mrs. Smith and yourself? A. Not that I recall, sir.

Q. (By Mr. Wool): Proceed. What was the conversation?

A. That she did not need the money at that time and would just as well have the interest on it.

Q. What rate of interest were you paying on it?

A. I paid her a check for one year's interest at ten per cent.

Mr. Wool: I have no further cross-examination. I [42] do expect to recall the witness again.

The Referee: Very well.

(Testimony of Peter Cottrell Scott.)

Redirect Examination

Mr. Razeto: Just one question.

Q. Mr. Scott——

Mr. Razeto: May I see their Exhibit No. 1?

Q. On January 26, 1953, when you arranged to sell your house to Mrs. Stevens——

Mr. Wool: Just a minute, Counsel. What is the date of the escrow? Let's stick to the actual facts.

Q. (By Mr. Razeto): About January 26, when you executed the Deed to Mrs. Stevens in the office of your attorney, Mr. Wool, in her presence, did you come to any agreement regarding the retention of any interest in the property?

A. I did not get that.

Q. Did you have any understanding or agreement with Mrs. Stevens as to any interest you might have in the property you were selling to her?

Mr. Wool: I don't understand that question either. A. What interest?

Q. (By Mr. Razeto): Well, if she should resell it, would you get any money back?

A. No.

Q. Was there any understanding when she was to resell it? A. No. [43]

Q. How did you arrive at the consideration of \$16,000.00?

A. In discussing it with Jeffries, a real estate man down there, and upon the Real Estate Board's appraisal during the probate of the estate the prop-

(Testimony of Peter Cottrell Scott.)

erty was valued at something around \$14,000.00 at that time by them, and I thought \$16,000.00 would be a fair price.

Q. Did you enter into any agreement with Mrs. Stevens to the effect that you would still manage the property for her, help her sell it, anything like that?

A. No.

Q. You continued to live in the house after you sold it to her, did you not? A. Yes.

Q. How long did you remain in possession after you sold it to Mrs. Stevens?

A. Well, just in one day. I moved to 2015 Ray Drive when I returned from being married.

Q. In other words, after executing the deed at your attorney's office, you took off for Reno. Is that true? A. The following day.

Q. And married Mrs. Stevens? A. Right.

Q. Afterwards you returned to San Jose or Burlingame? A. Ray Drive.

Q. You never went back to your San Jose home?

A. On occasions I went back. I had personal things I had to get out.

Q. You had all of your furniture there?

A. Yes, sir.

Q. Household furniture and equipment?

A. Yes, sir. [44]

Q. The house was empty then from January 14, when you married Mrs. Stevens, until it was sold to the Johnsons?

A. Other than several times as when we stayed

(Testimony of Peter Cottrell Scott.)

there or I happened to stay in San Jose overnight for some particular reason, that I stayed there.

Q. You never told your friends or associates that you had sold the house to your wife, did you?

The Referee: Wasn't the Deed of record?

Mr. Razeto: Well, a person's statements also are important. Those are constructive notices; I understand.

Q. Did you ever tell anyone you had sold the property to your wife?

Mr. Wool: I object. You are not cross-examining.

Q. (By Mr. Razeto): I am just asking. Why are you hesitating?

A. I am waiting for you to get through.

Q. I am through.

A. I cannot say offhand. I have told a number of people, but just exactly who, I don't keep a diary.

Q. You know a James Wayne, a broker in San Jose, do you not? A. Yes.

Q. James Wayne was the person you contacted to sell the house. Wasn't he the broker you retained to sell the house in 1953?

Mr. Wool: Just a moment. There is no evidence——

Mr. Razeto: I am going to show it was never the intention of this man to release control of this property.

The Referee: He was her husband. [45]

Mr. Wool: Under the law of California, she could——

(Testimony of Peter Cottrell Scott.)

Mr. Razeto: This, Your Honor, was all a transaction to defeat creditors. That is all it was.

The Referee: I cannot assume it from the record.

Mr. Razeto: That is what I am trying to prove. But I am not having the opportunity. Here we have the facts: This man went to James Wayne and hired him to sell this house here for \$18,500.00; he got it in October of the same year. In other words, he and his wife were in collaboration in the entire thing to defeat creditors.

The Referee: So far as this property is concerned, I tell you the Court cannot see that at all.

Mr. Razeto: Very well. At least I want to present the fact. I have been overruled many times.

The Referee: On the objection by Counsel, the ruling is the same at this time.

Mr. Razeto: He has opened the transaction by offering Exhibit 1, relating to Exhibit 1——

The Witness: That is my transaction.

Mr. Razeto: But these were the same people.

The Referee: What are you talking about?

Mr. Razeto: The lady married the next day. That proves by inference that this man deeds to his wife in his attorney's office, the next day he marries her; eight months later he hires a broker to sell for a \$2,000.00 profit.

The Referee: If it were \$10,000.00 it would not [46] make any difference.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
The Ninth Circuit.

(Testimony of Peter Cottrell Scott.)

Q. (By Mr. Razeto): Did you ever rent this house after you sold it to Mrs. Stevens?

A. No.

Q. Who paid the taxes in April of 1953?

A. I don't know.

Q. You did, did you not, Mr. Scott?

A. I could have.

Q. You know you did. There is a record that you paid that in the Tax Collector's Office in San Jose.

The Referee: Listen. She was his wife at that time, wasn't she? She put up \$16,000.00 for the property.

Mr. Razeto: He paid the taxes and he did not rent it at all.

The Witness: No.

The Referee: I pay a lot of my wife's bills.

Mr. Wool: If that is going to be the rule——

Mr. Razeto: I am just presenting my facts. I would like to submit this.

The Referee: I want you to file briefs. I am going to have it submitted.

Mr. Razeto: Very well. These particularly: In re Kearny 116 Fed.(2nd) 899. This was where a transfer was made to a mother-in-law. There was a loan of \$13,000.00; he transferred the business. She paid off the \$13,000.00 and there was a difference of \$2,400.00 The Court held it was not fair consideration in the absence of proof. Here we [47] have a transfer with \$2,400.00 difference.

That is all.

The Referee: You have \$2,500.00 on a \$16,000.00 transaction.

Mr. Razeto: That may be so. This was \$2,300.00.

The Referee: Is the matter submitted?

Mr. Wool: I have had no direct examination as yet.

The Referee: I know. If you want to go ahead, go ahead. I tell you frankly, that unless I am mistaken on the law, I can rule on the case right now.

Mr. Wool: The bankrupt rests.

(Bankrupt rests.)

The Referee: Very well. Ten, ten and five for briefs.

(Submitted 10-10-5.)

[Endorsed]: Filed October 14, 1954, Referee. [48]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Specification of objections to discharge.

Order, Judgment and decree sustaining opposition to bankrupt's discharge in bankruptcy and denying such discharge.

Petition for review of referee's order by judge.

Certificate and report of referee relative to petition for review of referee's order, judgment and decree sustaining opposition to bankrupt's discharge in bankruptcy and denying such discharge.

Order.

Association of attorneys.

Notice of appeal.

Designation of record on appeal.

Cost bond on appeal.

1 volume of reporter's transcript of July 27, 1954, before the Referee.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of July, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB.
Deputy Clerk.

[Endorsed]: No. 14834. United States Court of Appeals for the Ninth Circuit. Peter Cottrell Scott, Appellant, vs. Norma Smith, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 18, 1955.

In the United States Court of Appeals
For the Ninth Circuit

No. 14834

In the Matter of

PETER COTTRELL SCOTT,

Bankrupt.

STATEMENT OF POINTS ON APPEAL

To Paul P. O'Brien, Clerk of the above-entitled
Court:

Peter Cottrell Scott, the appellant in the above-entitled action, hereby states the points that he will rely on in this appeal:

(1) The referee erred in concluding that the words "This Note Secured by a Deed of Trust Bear in Even Date Herewith" on a promissory note constituted a financial statement within the meaning of Sec. 14, (C) (3) of the Bankruptcy Act.

(2) There is no evidence to support the finding that Norma Smith by purported false Statement in writing was induced to, and in reliance thereon did make loan to Bankrupt.

SMITH, WOOL & PERREN,

By /s/ FRED A. WOOL.

[Endorsed: Filed September 8, 1955.]

No. 14,834

IN THE

United States Court of Appeals
For the Ninth Circuit

In the Matter of

PETER COTTRELL SCOTT,

Appellant,

vs.

NORMA SMITH,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

FRED A. WOOL,

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612 First National Bank Building,

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Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN, CLERK

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No. 14,834

IN THE

**United States Court of Appeals
For the Ninth Circuit**

In the Matter of

PETER COTTRELL SCOTT,

Appellant,

VS.

NORMA SMITH,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

The appellant Peter Cottrell Scott was adjudged a bankrupt on December 18, 1953 (Transcript of Record page 5).^{*} On June 15, 1954, Norma Smith, a creditor of bankrupt, filed her specifications of objections to discharge containing three grounds set forth in paragraphs 1(a) and 1(b), 2 and 3 (Tr. of Rec. 3-4). Upon hearing these objections, referee found the allegations of said paragraph 2 to be true and correct but did not find whether or not the allegations con-

^{*}Hereinafter referred to as Tr. of Rec.

tained in paragraphs 1(a), 1(b) and 3 were true or correct or otherwise (Tr. of Rec. 35-36).

Upon such findings the referee concluded as a matter of law: (1) that the objection to appellant's discharge should be sustained on the grounds specified in said paragraph 2 and that the discharge in bankruptcy should be denied for the last mentioned reason (Tr. of Rec. 36-37) and made his order accordingly (Tr. of Rec. 37-38).

Bankrupt filed a petition for review of referee's order by judge in the United States District Court for the Northern District of California, Southern Division, specifying certain alleged errors particularly set forth therein (Tr. of Rec. 10-14). On May 10, 1955, the order, judgment and decree of the referee in bankruptcy was affirmed and the findings of fact made by the referee in bankruptcy were approved and adopted by the said Court as its findings of fact (Tr. of Rec. 39).

Appellant filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, Southern Division, June 8, 1955 (Tr. of Rec. 10), and his statement of points on appeal September 8, 1955 (Tr. of Rec. 88).

STATEMENT OF FACTS.

The evidence in this proceeding is that Norma Smith loaned the bankrupt and his then wife, Eliza-

beth A. Scott, \$5,000.00 (Tr. of Rec. 45), after oral negotiations and an oral agreement to give a deed of trust on certain real property in San Jose (Tr. of Rec. 48). Norma Smith paid the \$5,000.00 to the bankrupt by check in February, 1945 (Tr. of Rec. 57). The note was not then prepared but was prepared by the bankrupt (Tr. of Rec. 63) and several days after the \$5,000.00 had been paid to the bankrupt and his then wife, the bankrupt gave the promissory note to Norma Smith in San Jose (Tr. of Rec. 57), which promissory note contained at the end thereof these words, "This note is secured by a Deed of Trust bearing even date herewith." (Tr. of Rec. 45). Norma Smith stated that she would not have loaned the bankrupt the money if she had known it had not been secured by a deed of trust (Tr. of Rec. 49). There was actually no deed of trust of even date with said promissory note (Tr. of Rec. 63). Although Norma Smith frequently visited the Scotts from 1945 to January, 1952, when the first Mrs. Scott died, she at no time discussed or inquired about the promissory note or the bankrupt's financial affairs even though the latter owed her \$5,000.00 (Tr. of Rec. 58-59).

ARGUMENT ON SPECIFICATIONS OF ERROR.

I.

THE REFEREE ERRED IN CONCLUDING THAT THE WORDS, "THIS NOTE SECURED BY A DEED OF TRUST BEARING EVEN DATE HEREWITH" ON A PROMISSORY NOTE CONSTITUTED A FINANCIAL STATEMENT WITHIN THE MEANING OF SEC. 14 (c) (3) OF THE BANKRUPTCY ACT.

The above-mentioned section of the Bankruptcy Act (11 U.S.C.A. Section 32(c)(3)) provides:

"(c) The Court shall grant the discharge unless satisfied that the bankrupt has (1) * * *; (2) * * *; or (3) obtained money or property on credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or (4) * * *;"

11 U.S.C.A. 32.

Norma Smith, the objecting creditor, in paragraph 2 of her specification of objections to discharge, alleged that bankrupt had obtained money from her by making a materially false statement in writing respecting his financial condition (Certificate p. 18, line 23 to p. 19, line 2). In support of this allegation she testified at the hearing on her objections that she had loaned the bankrupt \$5,000.00 and a few days later he had given her the promissory note offered and received in evidence in said hearing and set forth in full at pages 44-45 of the transcript of record. The last sentence of said note reads as follows:

"This Note is secured by a Deed of Trust bearing even date herewith."

No other writing was offered or received in support of the allegations of said paragraph 2. It is in evidence and is conceded that no deed of trust was given to the objecting creditor by the bankrupt at the time of the delivery of said promissory note.

From this evidence the referee found and concluded that said last sentence was "a materially false written statement respecting the bankrupt's financial condition" and by reason thereof sustained the objecting creditor's objection to discharge and denied bankrupt's discharge (Certificate p. 20, lines 1 to 4 and lines 20 to 28).

In *Collier on Bankruptcy*, 14th Edition, page 1359, section 14.36, there appears the following statement:

"Essential elements in general of 14(c)(3). Creditor alleging this objection must prove that the bankrupt:

- (1) obtained money or property on credit or an extension of credit;
- (2) that he did so on a materially *false statement respecting his financial condition*;
- (3) *that such statement was in writing*; and
- (4) that the statement was made or published by the bankrupt or someone duly authorized by him." (Emphasis added.)

In order therefore for the referee to reach his decision he had to find and conclude that the promissory note and particularly the last sentence thereof was "a false statement in writing respecting the bankrupt's financial condition". This we contend was in error for, as stated in *Collier on Bankruptcy*,

“It was not the intention of Congress to extend clause (3)—14(c)(3) to all cases of false written statements where credit happens to have been given, but it should be confined to cases where the decision to give credit was induced by the false statement, which must have been, if not the moving cause behind the giving, extending, or renewal of credit, a contributing cause, i. e., the lender or seller must to an extent at least have relied upon it. Although it was formerly held that Clause (3) was not confined in its application to statements of general financial condition but covered any material statement of fact made in writing to induce the credit, *it is now limited in its application to statements respecting the bankrupt's financial condition.*” (Emphasis added.)

Collier on Bankruptcy, 14th Edition, page 1365, section 14.39.

In the case of *In re Current*, 63 Fed. 2d 640 (CCA 7th Cir. 1933), Loring, a creditor, opposed bankrupt's petition for discharge on the same ground as urged in the case at bar, i.e., that the bankrupt had obtained credit or an extension thereof by a false written statement respecting his financial condition. The evidence in support of this objection was that Loring, to whom the bankrupt was indebted on a promissory note then due, presented to the bankrupt through Loring's bank a renewal note to be signed by the bankrupt and his brother. The bankrupt signed his own name and forged that of his brother. On this evidence the referee, like the referee here, reported the application for discharge unfavorably. The Dis-

strict Court sustained the creditor's objection and the bankrupt appealed to the Circuit Court, which reversed the lower Courts.

Judge Evans, speaking for the Circuit Court, said:

"Did appellant '(bankrupt)' obtain an extension or renewal of credit, by making or publishing, or causing to be made or published, in any manner whatsoever, a materially false statement in writing respecting his financial condition when he * * * presented the forged note to Appellee? He obtained credit by making a materially false statement in writing when he caused to be presented to the loaner a forged promissory note. Was it, however, in respect to his financial condition?"

*"The presentation of a note apparently signed by a responsible third party, would, we think, hardly be in reference to bankrupt's financial condition, as that phrase is here used. It is the representation that the bankrupt enjoys the backing of a responsible party, which fact indicates the existence of credit. However, the phrase 'respecting his financial condition' limits and restricts the false statement which may defeat the discharge. In short the financial statement must be in respect to the bankrupt's financial condition. * * *."* (Emphasis added.)

"Moreover subdivision (2) of this section '14b' used the same phrase 'financial condition' in such a way as to leave no doubt as to its meaning. Such being the fair interpretation of the statute, Courts are not at liberty to extend the meaning of the words to cover a particular case which might well have been included by Congress."

To paraphrase: the presentation of a promissory note apparently secured by a deed of trust would hardly be in reference to bankrupt's financial condition, as that phrase is used here. It is the representation that the bankrupt enjoys the backing of some property, but it does not indicate what property, the value thereof, nor what other or prior indebtedness may be against it. In short, the note in the case at bar, while a false statement in writing, is not a statement respecting Scott's financial condition.

In *Johnston v. Johnston*, 63 Fed. 2d 24, the bankrupt had forged his partner's name to a letter stating that he the bankrupt had authority to sign any papers in connection with the partnership business. When the bankrupt applied for a discharge his partner opposed his application urging the forged letter as a false written statement respecting the bankrupt's financial condition. From an order of the District Court granting the bankrupt a discharge, the former partner appealed.

Judge Parker of the Fourth Circuit, in affirming the order of the District Court, said:

“The letter relied on was plainly not a statement respecting the financial condition of the bankrupt. It related neither to his financial condition nor to that of the partnership of which he was a member, but to his authority to act for the partnership. While its use was reprehensible, it cannot by any sort of interpretation be said to fall within the present language of the act. Even before the statute was amended (1926) not every fraudulent representation would bar discharge.

Even the giving of worthless checks or mortgages on property not owned was held to come within its terms." (Citing cases.)

Judge Parker continued, quoting with approval from *Lockhart v. Edel*, 23 Fed. 2d 912:

"Provisions of the section relating to a bankrupt's discharge are not to be extended by construction and the provisions as to discharge are to be construed liberally in favor of discharge."

In the case of *In re Schaeffer*, 68 Fed. 2d 902 (CCA 2d Cir. 1934), the bankrupt was denied a discharge when it was shown that he signed a note and conditional sales contract for an automobile which was purchased from the objecting creditor for delivery to a third party. The discharge was denied because of the claim that bankrupt had obtained property by a false statement.

The Circuit Court in reversing the District Court said:

"The ground suggested for the denial of the discharge here is the obtaining of property upon a false statement. Such a statement must concern the financial condition of the bankrupt * * *."

An examination of the promissory note involved in this case in light of the foregoing authorities discloses that while the statement contained thereon is false it stops there. Nothing contained in the note and particularly in the last sentence refers to any particular property, real or personal, the value thereof, the rank or position of the supposed deed of trust, or

to any other financial matters pertaining to the bankrupt. How then can anyone reading this note determine any better the bankrupt's financial condition than he could determine how far is up? Obviously in neither instance is there given either beginning or end from which any determination may be made.

Since there is no direct and positive statement respecting bankrupt's financial condition contained in the note, can such a statement be inferred from the circumstances surrounding the making and from the statements contained in the note?

That question was presented in *Robinson v. Williston & Co.*, 266 Fed. 2d 970 (CCA 1st Cir. 1920). In that case the bankrupt Robinson had given a check to Williston & Co. for the purpose of obtaining credit from them. He had neither money or credit with the bank upon which the check was drawn and did not even have an account in that bank. His discharge was opposed on several grounds as in the present case and his application was denied, as also in the present case, on the grounds that the check constituted a materially false statement in writing. (Since this was prior to the 1926 amendment adding the words "respecting his financial condition" the latter words were not involved.)

Upon appeal to the Circuit Court, Johnson, the circuit judge, in reversing the District Court, said:

"We agree * * * that a 'materially false statement in writing' * * * may include any 'materially false statement in writing' made by the bankrupt for the purpose of obtaining money or

credit and by which money or credit is obtained; but we think such false statement should not be created alone from acts of the bankrupt.” (pp. 971-972.)

“Did the bankrupt in this case, by signing a check, which is simply a request to a bank to pay to the payee a certain sum of money upon its presentation, make any ‘materially false statement in writing’? It is true that the check purports to be drawn upon a bank where the maker has funds or credit, and from his act in giving the check this may be inferred. If the bankrupt had made an oral statement at the time the check was given, that it was good, or would be paid when presented, or that his account was overdrawn, but that he had made arrangements with the bank on which it was drawn by which it would be paid, none of these oral statements would be a bar to his discharge.

We think it was the evident design of Congress to confine the objecting creditor to the limits of a specific statement in writing made by the bankrupt, and that such a statement cannot be extended beyond the fair and necessary meaning.” (p. 972.)

Following the reasoning and authority of the foregoing case (which has never been overruled or even limited), then no inference may legally be drawn to supply the missing details as to what property might have been referred to, its possible value, or the order or rank of the lien thereon. Neither may the oral statements of the bankrupt be resorted to to supply these deficiencies.

See, also:

In re Vamos, 14 Fed. Supp. 700.

The authority of the *Robinson* case is all the stronger in view of the fact that it was decided before amendment requiring the written statement to be "respecting his (the bankrupt's) financial condition".

In re Current, 63 Fed. 2d 640.

The objecting creditor, when before the referee, urged as authority for her contention that the promissory note here in question was a written statement respecting bankrupt's financial condition, the case of *In re Powell*, 22 Fed. 2d 239 (D.C. Md. 1927), in which a false chattel mortgage was held to bar a discharge. A reading of this case shows that giving of the mortgage, the adjudication and the application of the discharge all took place before the amendment of 1926 by which the present closing phrase of Section 14(c)(3) was added. The District Court in that case said:

"Whether the substituting of the closing phrase 'respecting his financial condition' which is the only change pertinent to the present issue, for the words 'for the purpose of obtaining credit from such persons,' has the effect of narrowing the meaning of 'a materially false statement' we need not here decide, because the giving of the mortgage, the adjudication, and the application for discharge all antedate, and are not affected by, this latest amendment."

Thus it is clear that the Court decided only that a false chattel mortgage was a "false statement in

writing” and did not decide that such false chattel mortgage was “a false statement in writing respecting his (the bankrupt’s) financial condition” as now required by the Bankruptcy Act.

The objecting creditor also urged before the referee that the written statement did not have to be a financial statement and in support thereof cited the following cases: *In re Weiner*, 103 Fed. 2d 421; *Albinak v. Kuhn*, 149 Fed. 2d 108; *Mau v. Sampsell*, 185 Fed. 2d 400, and *Yates v. Boteler*, 163 Fed. 2d 953.

It is conceded that the written statement does not have to be in the form of a financial statement, for the foregoing cases do contain such a holding, but they hold also that the content of such statements must be “respecting the bankrupt’s financial condition.”

In the *Weiner* case, above, the bankrupt had entered into an agreement in writing by which he obtained an extension of credit and represented that he had a valid promissory note against one Jed Harris which he assigned to Roeding, the objecting creditor. The bankrupt had no such promissory note, he being only an accommodation endorser thereon, and having a right thereunder only if he had paid.

The situation was somewhat similar in *Albinak v. Kuhn*, *supra*. The bankrupt, for the purpose of inducing a financial institution to part with its money and purchase certain purported accounts receivable, entered into a written agreement with the financial institution whereby he represented that he was solvent and that certain specified amounts were due on

accounts receivable from named customers and that there were not setoffs to said accounts and that the same had not been paid or transferred. Certain of the accounts receivable were shown to be nonexistent and an audit showed the bankrupt to have been insolvent at the time.

The circuit judge said:

“* * * the assignments warrant and covenant that at their date the assignor ‘(bankrupt)’ was solvent, and so, however persuasive may be the reasoning that a false statement of receivables is not a statement of financial condition, a warranty of solvency can be, and is nothing else. The representation of bankrupt’s solvency was false * * *.”

In *Mau v. Sampsell*, *supra*, the bankrupt owed the creditor a certain sum of money which was due and the creditor was demanding he be paid. The bankrupt wrote a letter stating that an existing escrow would net cash in excess of the debt, and requested, in effect, an extension of credit until the close of the escrow. The creditor withheld action upon the strength of the letter. No such escrow was in effect and upon bankrupt’s application for discharge and the opposition thereto by the creditor, his discharge was denied upon the ground that the letter was a false statement respecting the bankrupt’s financial condition. The Circuit Court affirmed without opinion.

In *Yates v. Boteler*, *supra*, there was actually a false financial statement given to Dun & Bradstreet by the bankrupt. The creditor did not actually see this report but relied on a letter report thereof given

to him by Dun & Bradstreet. While in that case the Court states that the form of the false statement is unimportant and cites *In re Powell*, above, it does not hold directly or by inference that a false chattel mortgage as such is a statement respecting financial condition, although it was urged before the referee that it did so hold.

An examination of these cases shows that in each case there was a specific reference to facts and particulars of property and amounts of money by which some computation of the financial condition of the bankrupt could be made or a statement that he was solvent, and there can be no question that the latter is a statement respecting financial condition.

As has already been pointed out, there was nothing in the promissory note from which the slightest idea of bankrupt's property, worth, liabilities or solvency could be computed or ascertained. It has also been shown that such lack cannot legally be supplied by inference. The findings and conclusions of the referee as to paragraph 2 of the specification of objections are therefore in error and should be reversed.

II.

NO EVIDENCE TO SUPPORT FINDING THAT NORMA SMITH, BY PURPORTED FALSE STATEMENT IN WRITING WAS INDUCED TO, AND IN RELIANCE THEREON DID, MAKE LOAN TO BANKRUPT.

In the event that it could possibly be held that the promissory note, and particularly the last sentence

thereof, was a "false statement in writing respecting his financial condition", the evidence does not support the referee's finding "that the bankrupt by said last mentioned words (This note is secured by a Deed of Trust bearing even date herewith, appearing on said promissory note) induced said Norma Scott (sic) to rely on the truth and correctness thereof and that she, so relying, made the afore-said loan in the belief that said loan was to be, and was, secured by a Deed of Trust, as on said promissory note stated." (Tr. of Rec. 35).

The only evidence relating to the time of the payment of said \$5,000.00 and the delivery of said promissory note as has been heretofore set forth shows that the money was paid to the bankrupt and his then wife and several days later, after the bankrupt had prepared the promissory note, the latter was delivered to Norma Smith. In other words, the loan was made first and the writing (which we do not concede was a financial statement) followed several days later (Tr. of Rec. 57-58).

Harold Remington, in his *Treatise on Bankruptcy*, 5th Edition, says, at page 599, "the extending of credit before the giving of the financial statement is insufficient" to bar a discharge.

In the case of *In re Woods*, 5 Fed. Supp. 901 (D.C. So. Dist. N.Y., June 19, 1933), the bankrupt applied for a discharge and a creditor filed objections specifying three grounds, the first being that bankrupt had obtained an extension of credit upon a false financial statement in writing.

Upon the hearing of the objections it appeared that bankrupt owed a bank \$35,000.00 maturing January 22, 1931. On that date he paid the bank \$2,500.00 and delivered a four-month note for \$32,500.00. The bank took the cash but declined the note, demanded a financial statement, and in the meantime took a ten-day note. The bank found unsatisfactory the statement furnished and applied a bank deposit of bankrupt of \$5,000.00 on the note. The bankrupt's attorney then offered to transfer certain property as collateral, which offer was considered by the bank. The ten-day note was about due so on February 3, 1931 bankrupt gave demand note for \$27,500.00. A few days later the bank decided against any further extension and the following month brought suit.

The objections to bankrupt's discharge were discharged and his application for discharge granted. Peterson, district judge, said:

"In my opinion the bank did not extend credit to the bankrupt upon the faith of the financial statement. The ten-day note was not taken in reliance upon the statement; *that note was received before the statement had been examined.* Nor was the later demand note of February 3rd taken in reliance on the statement. The bank had already indicated its dissatisfaction with the statement, and it took the demand note only as a provisional means while it was considering the proposal made for collateral security. Within a few days it rejected the proposal and demanded payment. Whether or not the statement was a false one, there was no credit extended on the faith of it, and the first specification fails." (Emphasis added.)

On appeal to the Circuit Court in *In re Woods*, 71 Fed. 2d 270, Swan, the circuit judge, said:

“With respect to the first specification, relating to a financial statement given to a bank, it will suffice to say that the bank did not extend credit on the faith of the statement, and we can see nothing in the record which compels a reversal of that finding.”

The Circuit Court reversed the order in the *Woods* case on other grounds.

In a recent case in the District Court for the Southern District of California, *In re Leonard*, 122 Fed. Supp. 214, objections were made to the bankrupt's discharge upon the ground that the bankrupt in order to obtain a loan from Pacific Finance Corporation, had made a statement in writing that his indebtedness did not exceed \$1,217.55, when it was in fact \$10,000.00. Upon the hearing a “witness came forth with a creditable statement which tended to corroborate the bankrupt's testimony that the loan had been consummated prior to the execution of the (written) statement and without reliance by the loan company upon either the statement or the supposed facts set forth in it.”

Tolin, district judge, said, at page 218:

“Whenever the giving of a false financial statement is urged as a ground for denial of a discharge in bankruptcy, to accomplish denial of discharge, it must be found that credit was obtained as a proximate result of the Statement, *Morlon v. Snider*, 20 Fed. 2d 469, 10 Amer. Bankr. Rep. NS 194. See also *Bank of Monroe*

v. Gleason, 8 Cir., 9 Fed. 2d 520, which holds that it is essential to show that a creditor relied on the false statement. Remington on Bankruptcy, Vol. 7, Fifth Edition, Sec. 3338, p. 601, 'Seventh Element, false statement must be relied on. The false statement must have been relied on, and if it was not relied on in parting with the property or in extending credit, the discharge will not be barred.' (Citing cases.)

The extension of credit must be after the giving of such a statement and in reliance on it. Such a conclusion in the case before us would only be possible by accepting answers to argumentively leading and suggestive questions put at a time when the witness disclaimed full memory and by rejecting testimony of the same witness when he testified after his memory was refreshed." (Emphasis added.)

There was a second ground of objection urged and the matter was rereferred to the referee to take evidence on the second ground, but the Court said:

"Unless that (the second) ground for denial of discharge be established, a discharge shall be granted to Wayne L. Leonard."

In the case at bar there is no dispute as to the time when the alleged statement was furnished. The objecting creditor herself testified that the money was paid to bankrupt and several days later the note was given her.

From the foregoing review of the evidence and the authorities applicable thereto, it is clear that there was not and could not have been any reliance upon

the promissory note and the statement thereon for the loan of the money, because the note was given to Norma Smith several days after the money was loaned. As already pointed out the law requires the objecting creditor to *rely* on a *written statement* of financial condition and unlike the statute of frauds a subsequent written memorandum of a previously unenforceable oral statement does not satisfy this requirement. Hence, there is no evidence to support the referee's finding in this respect.

III.

CONCLUSIONS OF LAW ERRONEOUS IN THAT THE SAME ARE BASED ON FINDINGS UNSUPPORTED BY EVIDENCE AND CONCLUSIONS UNSUPPORTED BY LAW.

As has heretofore been shown, the purported statement in writing, i.e., the promissory note, was not a "written statement respecting his (bankrupt's) financial condition". Furthermore, the money was not loaned in *reliance* upon the alleged written statement respecting bankrupt's financial condition. Both elements are indispensably necessary to bar a discharge.

Collier on Bankruptcy, 14th Edition, page 1359,
section 14.36.

It is quite clear then that the objecting creditor has shown neither of these necessary elements and has thus failed to show a reasonable ground, or in fact any ground, for the denial of the discharge.

"The requirement that the objector show 'to the satisfaction of the Court' reasonable grounds for

believing that the bankrupt has committed an act which would be a ground for denying his discharge does not leave it to the whimsical or capricious judgment of the district judge or referee, but supplies a test or standard of persuasiveness which has a well accepted meaning in ordinary civil cases.”

Collier on Bankruptcy, 14th Edition, page 1293, section 14.12.

Hence, since the referee's conclusions of law (Certificate p. 20, lines 20 to 28) the based upon findings unsupported by the evidence in this case, the same are therefore erroneous.

IV.

ORDER SUSTAINING OBJECTIONS AND DENYING DISCHARGE IS ERRONEOUS SINCE IT IS BASED ON ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Since the necessary elements to bar a discharge have not been proved by the objecting creditor and are not in fact present in the case at bar and the findings of fact and conclusion of law are erroneous, as has been shown by the foregoing, the order of the referee is entirely erroneous.

CONCLUSION.

The promissory note, including the last sentence thereof, is not a financial statement respecting the financial condition of the bankrupt within the mean-

ing of the Bankruptcy Act, 14(c)(3) (11 U.S.C.A. Section 32(c)(3)); there was no reliance upon the alleged written statement, it having been delivered to the objecting creditor after the loan was made; the conclusions of law are erroneous, being based upon findings unsupported by either evidence or law; and the order based upon said erroneous findings and conclusions of law is in error. The order of the referee should therefore be reversed and this Court either order discharge of the bankrupt, or remand the case to the referee with directions to enter an order granting bankrupt his discharge.

Dated, San Jose, California,
January 3, 1956.

Respectfully submitted,

FRED A. WOOL,

DONALD B. RICHARDSON, JR.,

Attorneys for Appellant.

No. 14836

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 930

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Come Now the Plaintiffs, and for cause of action
allege:

I.

That this action arises under Title 28, United
States Code, Section 1346 (b) as hereinafter more
fully appears.

II.

That the plaintiffs are now and at all times herein
mentioned were husband and wife, and as such con-
stitute a marital community under the laws of the
State of Washington and that they reside in Benton
City, Benton County, Washington, in the Eastern
District of Washington, Southern Division.

III.

That commencing in 1943 and thereafter the De-
partment of the Navy caused to be operated a prac-
tice bombing field near Richland, Benton County,
Washington and that Naval Personnel caused to be

used thereon certain types of practice bombs known as Mark 19, Mod. 1, which were loaded with a miniature practice bomb signal, AN-Mark 4, containing a blank No. 10 gauge shot-gun shell, extra length. That said object had no markings thereon, and appeared to be a piece of lead approximately 8 inches in length and 3 inches in diameter with a hole running through the middle.

IV.

That at a time unknown to this plaintiff the personnel of the Department of the Navy caused said bomb to be dropped in an area approximately 3 to 4 miles west of Benton City, on the shoulder of the road at the place known as the Waggoner Ranch where said instrument lay near a gulley.

V.

That the personnel of the Department of the Navy also caused to be dropped in and around the location hereinabove referred to numerous other objects of this same type, some of which exploded upon contact with the ground and several of which did not.

VI.

That these plaintiffs moved to a farm near Benton City during the year 1950 and that said farm was approximately 1 mile from the Waggoner Ranch hereinabove referred to.

That in the fall, 1951, one O. W. Osborne and one A. J. Osborne were guests at the ranch of the plaintiffs and in the course of walking through the area

came upon the bomb hereinabove mentioned, and the same being unmarked without any identification of its true nature was, by them, transported to the plaintiff, Elmer G. Coffey.

VII.

That on or about the 14th day of February, 1953, the plaintiff, Elmer J. Coffey, was examining said object and preparing to use the metal therein; that this plaintiff had no knowledge of the true nature of the object nor did he know of any facts which would reasonably lead him to know its nature, and he attempted to clean the hole running through the cylinder. That suddenly and without any warning whatsoever, the object exploded with great force while this plaintiff was holding the same.

VIII.

That as a direct and proximate result of said explosion, this plaintiff sustained a traumatic amputation of the left thumb, a compound fracture dislocation of the left first metacarpal and multiple lacerations of the left hand. That said injury is permanent and the plaintiff is presently suffering from limitation of both flexion and extension of the left index finger, and cannot use the left hand to full capacity. That said disability is a permanent disability of 75% of the use of the hand and will ever remain so.

IX.

That the disability to this plaintiff as above alleged hinders this plaintiff in his work in oper-

ating the farm and his work as a pharmacist; that he is unable to do the ordinary farm jobs such as tying knots, twisting wire, holding nails, changing tools, tightening bolts, repairing equipment, performing functions related to raising of sheep and other animals, making hay, carrying objects, and in addition at the time of the explosion suffered severe pain and shock and to the present time continues to suffer pain at the site of the injury.

X.

That as a direct and proximate result of said injury, the Plaintiff has incurred medical expenses in the amount of \$240.60, and will incur future medical expenses in the estimated amount of \$500.00, being a total in all of \$740.60.

XI.

That in addition thereto the plaintiff has actually paid out the reasonable sum of \$550.00 for assistance in carrying on the ordinary activities because of his failure to operate his farm properly and has sustained a loss of \$1,070.00 profits since the time of the injury and will continue to sustain a loss of at least \$1,000.00 a year hereafter.

XII.

That prior to said injury, the plaintiff, Elmer G. Coffey, was an able-bodied man, 47 years of age, with a life expectancy of 23.65 years, and that as a result of said loss of profits and earning capacity, this plaintiff has been damaged in the amount of \$23,650.00.

XIII.

That by reason of the severe pain and suffering, mental anguish and nervous shock, this plaintiff has been damaged in the amount of \$30,000.00.

XIV.

That the injuries to the plaintiff hereinabove described were solely and proximately caused by the negligence of the personnel of the Department of the Navy of the United States of America in the following particulars:

A. Failure to mark said practice bomb with any signs or indications which would warn persons who might come in contact therewith.

B. Dropping a practice bomb containing explosives harmful to persons who might come in contact therewith.

C. That said personnel were negligent in so constructing and using a bomb that the same would not explode upon dropping, striking the ground.

D. That said personnel were negligent in dropping said practice bomb in an area outside any practice range.

E. That said personnel were negligent in failing to warn and advise the public of the existence and potential danger of said practice bomb when said personnel knew or should have known of previous injuries and death resulting from persons coming in contact with said practice bombs.

F. That said personnel were negligent in permitting said practice bomb to appear in the shape and form resembling a weight and appearing to be harmless and attractive to persons coming upon the same.

G. In failing to keep all explosives under lock and key and to adequately post with red signs, clearly marking the dangerous quality thereof.

H. In permitting a dangerous instrumentality to be generally distributed among the public.

I. That said personnel were negligent in failing to clean up the area and remove all practice bombs which were still harmful.

XV.

That the negligence above set forth was solely caused by the conduct of agents and employees of the Department of the Navy, United States of America, and occurred while said personnel were acting within the scope of their authority and in the line of active duty.

XVI.

That under the circumstances hereinabove alleged, the said personnel, if they were private persons, would be liable to the plaintiff for his injury and damages resulting from said occurrence.

XVII.

That the sum claimed herein is in excess of \$1,000.00 and it is not necessary to present a claim in writing to the Department of the Navy.

Wherefore Plaintiff Demands Judgment against the Defendant in the total sum of \$56,010.60, together with the costs and disbursements incurred in this action, and such reasonable attorney fees as the court may award in the premises as provided by law.

MOULTON, POWELL, GESS &
LONEY,

By /s/ DEAN W. LONEY,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes now the defendant by William B. Bantz, United States Attorney for the Eastern District of Washington, and William M. Tugman, Assistant United States Attorney for said District, and in answer to the complaint of the plaintiffs admits, denies, and alleges as follows:

I.

The defendant admits the allegations contained in paragraphs I and II of the plaintiffs' complaint.

II.

The defendant denies each and every other allegation and thing contained in plaintiffs' complaint

and especially denies that the plaintiffs were damaged in the sum of \$56,010.60 or any other sum.

First Affirmative Defense

That there was no negligence or act of negligence or carelessness on the part of the defendant United States of America, or any of its servants or agents.

Second Affirmative Defense

That the plaintiff was guilty of negligence.

Wherefore, defendant prays that the complaint of the plaintiffs be dismissed and that the defendant have its costs and disbursements herein.

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly in its order to be heard before the Honorable Sam Driver, District Judge, and the plaintiffs appearing in person and being represented by their counsel of record and the defendant appearing by the Honor-

able William Tugman, Assistant United States Attorney, and evidence having been presented by and on behalf of the parties and the Court having considered the argument of counsel and being duly and fully advised in the premises,

Now Therefore makes the following Findings of Fact:

I.

That this is an action brought by the plaintiffs seeking damages for personal injuries sustained by the plaintiff, Elmer G. Coffey, which action is maintained against the United States of America and arises under title 28, United States Code, Section 1346 (b).

II.

That the plaintiffs are now and at all times herein mentioned were husband and wife, and as such constitute a marital community under the laws of the State of Washington and that they reside in Benton City, Benton County, Washington, in the Eastern District of Washington, Southern Division.

III.

That the plaintiffs during the year 1950 moved from Seattle, Washington, to a farm in Benton County, Washington, near Benton City, Washington, which farm was approximately one mile from that certain farm known and described as the Waggoner Ranch. That said Waggoner Ranch was joined to that certain ranch known as the Livengood Ranch with a gully running between the said farms.

IV.

That in the fall of 1951, one O. W. Osborne and A. J. Osborne were guests at the farm of the plaintiffs and while hunting in and about the gulley separating the Livengood Ranch and the Waggoner Ranch with the permission of the owners of said property, the said O. W. Osborne and A. J. Osborne discovered two objects in and upon the ground, which objects appeared to be made of lead approximately eight inches in length and two to three inches in diameter, which objects were delivered to the plaintiff, Elmer G. Coffey.

V.

That on or about the 14th day of February, 1953, the plaintiff Elmer G. Coffey preparing to use said object, attempted to remove the dirt, rocks and debris clogging the hole running through said object when suddenly without warning, said object exploded with great force while this plaintiff was holding the same.

VI.

That as a direct and proximate result of said explosion, the said plaintiff sustained a traumatic amputation of the left thumb, a compound fracture dislocation of the left first metacarpal, multiple lacerations of the left hand and complete atrophy or loss of the first dorsal interosseous muscle lying partly on the first metacarpal and partly on the second metacarpal. As a result the plaintiff has sustained a permanent disability to the left thumb and left index finger.

VII.

That the object which exploded was a thirteen pound practice bomb belonging to the United States Armed Forces and designated as a Mark 19, Mod. 1 loaded with miniature practice bomb signal AN-Mark 4, containing a Blank No. 10 gauge shotgun shell, extra length. That said object was used exclusively by the Department of the Navy and the Department of the Army.

VIII.

That the plaintiff, Elmer G. Coffey had no knowledge of the nature or condition of said object and to a reasonably prudent person, said object would appear to be harmless in nature and condition.

IX.

That at a time prior to 1951, the United States Armed Forces caused this object as well as numerous other objects to be dropped in this general area between three and four acres in extent which objects were dropped from a military aircraft, said property being at all times herein mentioned private property and said United States Armed Forces not being authorized to use said property as a practice target or bombing range.

X.

That the officers and agents of the United States of America were negligent in the following particulars:

A. Failure to mark said practice bomb with any signs or indications which would reasonably warn

persons who might come in contact therewith of the dangerous qualities of said object.

B. That said personnel were negligent in dropping a practice bomb in such an area with said bomb being constructed in such a manner that the tail fin would readily become detached and said object would then appear to be harmless in nature and show no indication of the fact that it was a bomb.

C. That said personnel were negligent in dropping said practice bomb in the area herein described, being outside any authorized practice range.

XI.

That the negligence hereinabove set forth was solely caused by the conduct of the agents and employees of the Military Services of the United States of America and occurred while said personnel were acting within the scope of their authority and in the line of active duty and under the circumstances, the United States, if a private person, would be liable to the plaintiff, Elmer G. Coffey, for his injuries and damage resulting therefrom.

XII.

That the negligence of said personnel was the direct and proximate cause of the injuries hereinabove set forth sustained by the plaintiff Elmer G. Coffey, who immediately prior to said injury was an able bodied man, 47 years of age with a life expectancy of 23.65 years.

XIII.

That as a direct and proximate result of said negligence, the plaintiff has incurred medical expenses in the amount of \$240.60.

XIV.

That as a direct and proximate result of the negligence of said personnel, the plaintiff Elmer G. Coffey by reason of pain and suffering and permanent disability, loss of earning, mental anguish and future medical expenses, has been damaged in the total sum of \$8,500.00.

From the foregoing Findings of Fact, the Court now concludes as a matter of law:

1. That the plaintiff Elmer G. Coffey is entitled to have and recover judgment against the defendant in the sum of \$8,500.00 together with the sum of \$240.60 for medical expenses incurred and the plaintiff's costs and disbursements incurred by plaintiff herein.

Entered by the Court this 4th day of March, 1955.

/s/ SAM M. DRIVER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 930

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, Husband and Wife,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This Matter having come on regularly in its order to be heard in the above-entitled Court before the Honorable Sam Driver, District Judge, and after trial of the action being had and decision of the Court rendered and having heretofore made and entered Findings of Fact and Conclusions of Law and being duly and fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed That the plaintiff Elmer G. Coffey be and he hereby is awarded judgment against the defendant in the total sum of \$8,740.60, together with interest thereon at the rate of four ~~six~~ per cent per annum from and after the date hereof and for the further sum of plaintiff's costs and disbursements incurred herein.

Done and entered by the Court this 4th day of March, 1955.

/s/ SAM M. DRIVER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

ORDER

This matter having come on regularly to be heard before the Court upon the stipulation of the parties agreeing that the judgment heretofore entered in this matter on the 4th day of March, 1955, be amended so that interest on the judgment awarded to plaintiff draw interest at four per cent instead of six per cent, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the second paragraph of said judgment be amended to read as follows:

“Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff Elmer G. Coffey be and he hereby is awarded judgment against the defendant in the total sum of \$8,740.60, together with interest thereon at the rate of four per cent per annum from and after the date hereof and for the further sum of plaintiff's costs and disbursements incurred herein.”

Dated this 5th day of April, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Approved:

/s/ DEAN W. LONEY,

Attorneys for Plaintiff.

Presented by:

/s/ WILLIAM M. TUGMAN,

Assistant U. S. Attorney.

[Endorsed]: Filed April 5, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, the defendant above named, by William B. Bantz, United States Attorney for the Eastern District of Washington, and William M. Tugman, Assistant United States Attorney for said District, does hereby appeal to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of March, 1955.

Dated this 2nd day of May, 1955.

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Affidavit of mail attached.

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on before the above-entitled Court on the 4th day of March, 1955, on the defendant's motion for a new trial, and the Court having heard the arguments of counsel and being fully advised in the premises, it is

Ordered that the defendant's motion for a new trial be, and hereby is, denied.

Dated this 13th day of July, 1955.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,

Assistant U. S. Attorney.

[Endorsed]: Filed July 13, 1955.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

Civil No. 930

ELMER G. COFFEY and MRS ELMER G.
COFFEY, Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Walla Walla, Washington, on Monday, February 28, 1955, before the Honorable Sam M. Driver, Judge of the above-entitled Court, sitting without a jury; the plaintiffs being represented by Dean W. Loney, appearing for Moulton, Powell & Loney, their attorneys; the defendant be-

ing represented by William M. Tugman, Assistant United States Attorney;

Whereupon, the following proceedings were had, to wit: [1*]

Walla Walla, Washington—February 28, 1955

The Court: Are you ready, gentlemen, in Coffey and wife against the United States?

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes, your Honor.

The Court: You may proceed, then.

Mr. Loney: I would like to call Mr. Osborne to the stand, if your Honor please.

The Court: All right.

OLIVER OSBORNE

called and sworn as a witness on behalf of the plaintiffs, was examined, and testified as follows:

Direct Examination

By Mr. Loney:

Q. Will you state your name, please?

A. Oliver Osborne.

Q. Mr. Osborne, where do you reside?

A. 13417 First Southwest, Seattle.

Q. And what is your occupation?

A. Operating engineer.

Q. Are you related to Mr. and Mrs. Elmer Coffey?

A. Yes, Mrs. Coffey is my sister. [2]

Q. Do you know where Mr. Coffey now resides?

A. Yes.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Oliver Osborne.)

Q. Near Benton City, Washington. And you are familiar with his farm, having been out to it on occasion? A. Yes.

The Court: I didn't get where he lives.

A. 13417 First——

The Court: No, I mean the plaintiff, your brother-in-law.

A. Oh.

Mr. Loney: Near Benton City, Washington.

The Court: Oh, yes.

Q. (By Mr. Loney): Did you have occasion to visit Mr. Coffey's farm off and on during, say, from 1945 on?

A. No, it wouldn't have been 1945.

Q. Later than that?

A. It would have been later than '50, I believe.

Q. Well, you visited him after he purchased the farm there? A. Yes.

Q. And moved there, is that correct?

A. Yes.

Q. Did you have occasion to go around on adjoining land and do any hunting?

A. Yes, during the hunting season. [3]

Mr. Loney: I wonder if this might be marked, if your Honor please?

The Court: All right.

The Clerk: That will be Plaintiff's Exhibit 1 for identification.

Mr. Loney: May I address your Honor?

The Court: Yes.

Mr. Loney: Concerning this, I obtained this from Mr. Tugman and we are not sure of its iden-

(Testimony of Oliver Osborne.)

tification, but we would like to introduce it for the purpose of illustration and let Mr. Tugman's witness later identify what has been done to it, what may be changed, if anything.

The Court: Yes, all right. Is that acceptable?

Mr. Tugman: That is acceptable.

Q. (By Mr. Loney): Showing you what has been marked as Plaintiff's Exhibit 1 for identification——

Mr. Loney: May I hand it to him?

The Court: Yes, go ahead.

Q. (By Mr. Loney): ——would you tell me if you have seen anything similar to that?

A. Yes, I have.

Q. Did you have occasion to find either that object or something similar to it? A. Yes.

Q. Near Benton City? Can you tell me what you were doing [4] at the time you found them?

A. We were bird hunting in the Benton City district near my brother-in-law's farm.

Q. Do you know roughly about where you were when you saw them?

A. Oh, somewhere about three and a half, four miles, west of Benton City, probably. I don't know exact mileage.

Q. Do you know about how far you were from Mr. Coffey's farm?

A. Oh, probably a mile and a half, two miles.

Q. Had you walked from his place or had you driven a car?

A. Well, I don't remember just exactly. You

(Testimony of Oliver Osborne.)

ordinarily would be walking when you are bird hunting.

Q. Can you describe, oh, the land that you were walking on, the kind of terrain you were on?

A. Rough, hilly terrain, I would say.

Q. Rocky? A. Fairly rocky, yes.

Q. Was it being farmed around here?

A. Yes.

Q. Were you on level land or in the gulley or depression, or just what?

A. As I remember, it was in a gulley, weedy draw.

Q. Was someone with you at the time? [5]

A. Yes, my brother.

Q. And is he here today? A. Yes.

Q. Do you recall which one of you gentlemen discovered the object? A. No.

Q. When you did discover it, what did you do?

A. Well, we first thought—discovered it was lead, take it to Elmer, or Mr. Coffey, being as he poured a lot of bullets; made a lot of his own bullets for molding.

Q. Were you aware at that time that this object was lead?

A. Yes, as near as you could tell. By scratching the corrosion off of it with his finger nail, see, it resembled lead.

Q. Would you mind testing your finger nail on this and determine if you can scratch it?

A. Get the dirt off of it, see it wasn't rock, it is metal.

(Testimony of Oliver Osborne.)

Q. You can, by use of your finger nail, disclose a shiny substance? A. Yes.

Q. Were you on any kind of an area that had any particular signs that it either belonged to the government or had belonged to the government?

A. No. [6]

Q. Were there any warning signs of any nature indicating the presence of a bombing or target range? A. No.

Q. So far as you know, has that area ever been a bombing range?

A. Not as far as I know.

Q. How many of these objects did you find?

A. Two.

Q. How were they laying? Did they have dirt around them?

A. Partially covered with dirt.

Q. And what did you do after you and your brother took them into your possession?

A. As near as I recall, we carried them back to Coffey's.

Q. And handed them to him?

A. I don't recall, handing them to him or throwing them down on the ground, whichever it was. He made the remark, "Well, thanks, fellows, for bringing the lead," or something to that effect.

Q. Do you know about the time that this occurred, about the year?

A. It must have been in the fall of '51. I don't recall the exact year.

Q. Were there any indications of a fin that you

(Testimony of Oliver Osborne.)

might expect on a bomb? A. No. [7]

Q. Any kind of metal indicating a fin around or on it at the time you picked it up? A. No.

Q. Did you have any knowledge as to what this object was? A. No.

Q. Did you see any indications on the object that there *might an* explosive of any kind in it?

A. No.

Q. Before you picked that up, had you ever seen an object like that before? A. No.

Q. I believe that on your deposition you made mention of the fact that you had been on the Zillah Bombing Range?

A. I don't believe I said I had been on it. I had been near it.

Q. Oh. Are you familiar with its location?

A. Not too much.

Q. Well, do you know roughly? Is it any place close to where you found these objects?

A. I wouldn't think so.

Q. Did you know anything about the existence of a bombing range immediately north and west of Richland? A. No.

Q. Do you know anything about that today? [8]

A. No.

Q. Do you know whether or not you were close to the Yakima River at the time you found these objects? A. Yes, you could see the river.

Q. Do you know roughly how far you were from it? A. Possibly a mile.

Q. You would be a mile to the north of the river?

(Testimony of Oliver Osborne.)

A. Yes.

Q. Still in Benton County, is that correct?

A. Yes.

The Court: A mile north of the Yakima River?

A. Yes.

Q. (By Mr. Loney): Was the bomb or the object in this condition when you found it as far as cleanliness is concerned? A. No.

Q. What difference did it have on it?

A. It was dirty.

Q. Do you recall whether or not there now appear to be two holes or a hole leading all the way through the object, is that correct?

A. It appears there, it is there now. It didn't appear that way when we found it.

Q. At the time you found it, were you able to discover the existence of a shotgun shell? [9]

A. No.

Q. Or anything of that nature in it. Do you recall the condition of each end of this hole running through it? A. No, I wouldn't recall that.

Q. You recall the time that Mr. Coffey had his accident? A. Yes.

Q. Between the time that you found these objects and the time that Mr. Coffey had his accident, did you have any other knowledge about these objects or have any other connection with them at any time? A. No.

Q. When was the first time that you learned that there might be an explosive of any kind in that object?

(Testimony of Oliver Osborne.)

A. When I came to his place the same day of his accident, was the first I knew of any explosive in it.

Q. Was that before or after the accident?

A. That was immediately after the accident.

Q. Are you familiar with any type of bombs?

A. No.

Q. Have you ever run across them any place in your hunting or travelings? A. No.

Mr. Loney: I have no further questions, your Honor.

The Court: All right, you may cross-examine.

Mr. Tugman: I didn't quite hear him. [10]

The Court: Yes, he said he had no further questions.

Cross-Examination

By Mr. Tugman:

Q. Mr. Osborne, is this object here in the same condition now as it was when you first found it?

A. No.

Q. How does it differ?

A. It has the hole clear through it and it is much cleaner.

Q. Which end was the hole through when you first found it? Would you look at it?

The Court: This, I understand, isn't one of the two found; it is something similar to it; isn't that correct?

A. Well, it is similar.

Mr. Loney: If it please your Honor, I under-

(Testimony of Oliver Osborne.)

stand that after the accident, some personnel from the Naval service came out and took the object that caused the explosion, and I understand that this is the object; is that correct?

Mr. Tugman: I understand that it is.

The Court: Oh, this is the one. It wasn't broken apart then, it blew out through the end there?

Mr. Loney: Yes, your Honor.

The Court: Oh, I see. Well, that is the same one, [11] then.

Mr. Tugman: We can show that at a later time, your Honor.

The Court: I see, all right.

Q. (By Mr. Tugman): Would you please tell which end the hole was through?

A. There wasn't any hole through it when we found it.

Q. You said there was a hole in it. Which end?

A. Well, I couldn't tell you.

Q. You don't remember whether it was the large end or the tapered end?

A. No, I couldn't say.

Q. Now, what type of material was around the outside of that?

A. Sandy dirt, was as much as I could tell you.

Q. I see. How much of that did you rub off?

A. Well, not any more than what you could take off with a thumb nail to discover that it was metal.

Q. I see. Now, are there any other changes in that condition of that bomb from the time you first saw it?

(Testimony of Oliver Osborne.)

A. Well, I couldn't say that, either, because it is vague.

Q. Is it smaller now than it was at the time that you first picked it up.

A. Well, I couldn't say.

Q. Is part of it missing on one end? [12]

A. It wouldn't be safe for me to say that. I don't remember exactly what it looked like.

Q. In other words, you just don't remember what the thing looked like when you first picked it up?

A. Because it was dirty. Didn't look like this because it wasn't this clean.

Q. I see. Did it weigh more or less than it does now, or——

A. I couldn't tell you that, either.

Q. And you don't remember which end the hole went through at all?

A. No, I couldn't recall that.

Q. Did you look into the end that had the hole?

A. I didn't examine it, no.

Q. In other words, you just picked it up and found it was lead and took it to Coffey?

A. That's right.

Q. And that is all the further interest you had in it?

A. Yes.

Q. So you didn't make any examination at all to try and determine what the nature of the object was, is that correct?

A. That's right.

Mr. Tugman: I have no further questions.

(Testimony of Oliver Osborne.)

A. If I had known it was a bomb, I would never have [13] touched it, that is for sure.

The Court: Any further questions?

Mr. Loney: May this be marked?

The Clerk: I think maybe a sticker would work best on that.

The Court: All right.

The Clerk: That will be Plaintiff's Exhibit 2 for identification.

Mr. Loney: With your Honor's permission, I would like to show this to the witness for the purpose of illustration.

The Court: All right.

Redirect Examination

By Mr. Loney:

Q. I am showing you what has been marked as Exhibit 2 for identification. I want you to observe the end of that object that appears to remain intact, and I will ask you if that appears to be open or closed, that hole?

A. Well, I would say it was closed with the dirt and rock that is there.

Q. Has that any relationship to the way this other object looked when you found it?

A. Similar, yes.

Q. Mr. Tugman mentioned that you said there was a hole. [14] Did you say there was a hole in it?

A. I don't recall saying there was a hole in it.

Q. Was there any way that you could see into the object, as you recall? A. No.

(Testimony of Oliver Osborne.)

Q. Is there some other indication of the fact that this object is lead other than just scratching it? Can you tell by, for example, the weight of it?

A. Well, the weight would give you the indication of it being lead, yes.

Mr. Loney: May I hand this to your Honor? Would you like to see it?

The Court: Yes.

(Exhibit 2 handed to Court.)

Mr. Loney: I have no further questions.

Recross-Examination

By Mr. Tugman:

Q. Mr. Osborne, you did say there was a hole in it at one end?

A. Resembling a hole, probably, because it would be full of what we thought was dirt.

Q. What you thought was dirt? A. Yes.

Q. Now, in your deposition, you mentioned that there was [15] corrosion inside this hole. What did you mean by that?

A. I beg your pardon, I don't believe I stated that.

Q. Didn't you state that there was some corrosion in there that didn't look natural to lead or to an object of the type you found?

A. Would you repeat the question?

Q. Didn't you state that there was some corroded matter in there that didn't look natural to a pipe or an object of that kind?

(Testimony of Oliver Osborne.)

A. I say it was dirt, yes, resembled dirt.

Q. What did you mean in your deposition when you stated that there was corrosion in there?

A. I believe that is my brother's statement, not mine.

Q. It couldn't have been anything that looked like corroded metal in there, could there, that might have looked like dirt? A. I don't think so.

Q. The dirt, and so on, inside this bomb was pretty much the same color as the bomb itself, was it not? A. Pretty much.

Q. Well, how deeply could you see into this hole? A. Very shallow.

Q. How deeply could you see? A half an inch?

A. Possibly.

Q. How far into the end of this (indicating)?

A. Oh, possibly a quarter of an inch, maybe half inch.

Q. Would you please——

Mr. Tugman: I wonder if we have something that he could mark how far in the bomb he could see?

A. Well, that has been too far back to make a statement on it.

Q. Would you look at that and say just how far you could see? You said about a half an inch or maybe three-quarters of an inch, or how far in could you see?

A. Very shallow, possibly like that one that was there.

Q. Well, that is not a half inch or anything like

(Testimony of Oliver Osborne.)

that. There was enough of an opening there, at any rate, so that you could see in, is that correct?

A. No, I wouldn't say that.

Q. What did you mean in your deposition, then, when you said you could look into the hole and see corroded matter in there?

A. I believe that was my brother's statement.

Q. Well, did you notice anything that looked like corroded matter in there?

A. Not that I can say.

Mr. Loney: Perhaps, your Honor, if Mr. Tugman has something in the deposition, he could point it out specifically.

The Court: Yes, that is the proper way to examine, [17] if you want to question his prior statement or compare it to his testimony.

Q. (By Mr. Tugman): Did you talk about this object when you found it at all? Was there any conversation between you and your brother?

A. I don't recall the conversation.

Q. Now, in the immediate area where you found this bomb, did you find any other objects metal objects, at all?

A. No.

Q. You didn't say that you found another bomb?

A. We found two of them, similar.

Q. How far apart were they?

A. Well, I don't recall exact distance.

Q. Were they both lead? A. Close, yes.

Q. How far apart were they? A. Oh——

The Court: Approximately, if you know.

(Testimony of Oliver Osborne.)

A. Approximately five or six feet.

Q. (By Mr. Tugman): I see. What did you do with the second bomb?

A. I don't know what became of it.

Q. Did you take it back to Mr. Coffey?

A. Pardon?

Q. Did you take it back to Mr. Coffey? [18]

A. We took both of them to him.

Q. What did you think this object was when you found it? A. A piece of lead.

Q. What nature of a piece of lead? I mean, any particular item?

A. I never seen anything like them before.

Q. I see. Then, you didn't really think it was anything at all, just a piece of lead that was out there, a stray piece of lead, is that right?

A. Yes, sir.

Mr. Tugman: I have no further questions.

The Court: Do you have anything else, Mr. Loney?

Mr. Loney: No, your Honor.

The Court: There is just this, I am not sure I got your testimony about where you found this object. Was it in an open country about a mile north of the Yakima River, you said?

A. Yes, fairly open country.

The Court: Was it fenced in?

A. Yes.

The Court: In a fenced enclosure?

A. Yes.

(Testimony of Oliver Osborne.)

The Court: And did you know who the land belonged to?

A. Yes, we had permission to hunt on it. [19]

The Court: Oh, I see. It was private property, then, owned by someone who had given you permission to hunt there?

A. Yes, sir.

The Court: That is all the questions I have.

Mr. Loney: Your Honor, I brought over some colored slides of the particular area and I would like to identify them by this gentleman, if I can. I was going to wait until I could get a viewer at lunchtime, which I will do, but I would like to identify them, if I may.

The Court: All right.

The Clerk: Plaintiff's Exhibit 3 for identification, Plaintiff's 4 for identification, and Plaintiff's 5 for identification.

Mr. Loney: I realize it is rather hard to make these out.

Redirect Examination

By Mr. Loney:

Q. Would you examine this, Mr. Osborne, and see if that looks somewhat like the location of where the objects were found?

A. Yes, that looks like the country.

Q. You observe what appears to be a ravine or a gulley in about the center of the picture [20] there?

A. Yes.

Mr. Tugman: I might ask, Mr. Loney, is he

(Testimony of Oliver Osborne.)

going to qualify these exhibits for who took them, when and where?

Mr. Loney: Well, if you have any objection along that line, I took them myself from a place that was pointed out to me as being the location.

The Court: I think if you can establish the time and then have this witness say that they are a fair and accurate representation of the terrain at the time of this incident, that that would be sufficient to identify them.

Mr. Tugman: Well, all right, your Honor.

Mr. Loney: If your Honor please, will you accept my statement on that, counsel? To the best of my recollection, they were taken sometime in August.

Mr. Tugman: Certainly.

The Court: All right. August of this year?

Mr. Loney: Last year.

The Court: Last year, that would be 1954.

Q. (By Mr. Loney): Now, as far as the vegetation and the growth around there, is there any way you can tell whether that was similar, recalling these were taken now in '54? Can you tell whether or not that is similar to the way it looked?

A. I would say it was similar to the terrain when we were hunting. [21]

Q. It appears to be an orchard there along part of that? A. Yes.

Q. Was that orchard there at that time?

A. Yes, I'm sure it was.

The Court: Have you seen these enlarged and on a screen, Mr. Osborne?

(Testimony of Oliver Osborne.)

A. No.

Mr. Loney: This is the first time he has seen them.

The Court: I see. You are just looking at the original?

A. Uh-huh.

Mr. Loney: Before I introduce them, I think I would prefer to have some way of enlarging them.

Q. Would you mind looking at Plaintiff's Exhibits 4 and 5? Just examine them and see—You should look at the back side, this way (indicating) and that will give you the proper perspective.

Examining No. 4 there, can you see the river, the Yakima River, in the foreground, or not?

A. No, I can't detect it.

Q. I guess you can't. Examining No. 5, can you make any heads or tails out of that?

A. Well, it looks similar to the terrain, the same as the other.

Mr. Loney: If I may introduce these after lunch, [22] counsel. Do you wish to examine them now?

The Court: Have you seen them?

Mr. Tugman: No, I haven't.

The Court: Would you like to look at them?

Mr. Tugman: Not at this moment. I will want to look at them a little later.

Mr. Loney: That is all the questions I have.

The Court: If there are no other questions, you may step down.

(Witness excused.)

Mr. Loney: Mr. Osborne.

ALBERT J. OSBORNE

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Your name, Mr. Osborne, is A. J. Osborne?

A. Albert J., yes.

Q. And your residence is Seattle, Washington?

A. 13417 First Avenue Southwest.

Q. And you are the brother of Mrs. Coffey and Mr. Oliver Osborne who testified?

A. That's right.

Q. You heard his testimony here in court this morning? [23]

A. Yes, most of it.

Q. Do you recall finding an object similar to this object that has been marked as Identification 1?

A. Yes, I do.

Q. Would you state whether or not that object now appears to be in the same condition or different condition than the object was when you found it?

A. Well, it looks similar, but, of course, it is much cleaner and it doesn't have the general appearance now that it did when we found it, although it is about the size. I think we found two at the same time.

Q. Do you recall whether or not there was a hole in the object?

A. No, I don't, I don't recall.

(Testimony of Albert J. Osborne.)

Q. Do you recall whether or not the end had the same appearance of being mutilated?

A. No, I don't believe it did, to my knowledge, although it may have been battered to some extent.

Q. Did it appear to be the same weight as this object? A. Approximately.

Q. Did you have any knowledge of what the object might be? Did you form any conclusion or anything of the object?

A. Well, as I recall, at the time we picked them up, we wondered what they were. Of course, it didn't take too long to determine they were lead and they were very [24] heavy, and I think I made a statement somethink like that "I wonder if that is a piece of lead conduit of some type that possibly the telephone company used?" and knowing some of their works, they do use a heavy type lead conduit. And otherwise from that, I don't believe there was much more of a statement made. We knew they were lead, Mr. Coffey used a lot of lead, so our first thought was taking them to him.

Q. Have you ever seen a bomb or an explosive of any kind remotely resembling that in any way?

A. I don't think so. I had occasion to see some, oh, something like bombs like that in displays after they were identified. In fact, in Seattle there at the time, why, I hadn't even remembered them being tapered; I thought, as I remembered them, they were more just like a cylinder, but after they were identified, then I could see a resemblance to possibly

(Testimony of Albert J. Osborne.)

something like that, but I am not familiar with them, no.

Q. Between the time you took them to Mr. Coffey's place—incidentally, that was on the same day you found them? A. Yes.

Q. You were staying at his place?

A. Yes, hunting there.

Q. During hunting season? A. Yes. [25]

Q. 1951? A. Approximately.

Q. After you took them to his place and up until the time the explosion occurred, did you have any knowledge or learn anything during that period of time that would lead you to form a conclusion as to whether or not that was an explosive in it?

A. No, sir.

Q. The terrain where you found this, can you describe that to the best of your ability?

A. Well, I would say it is more of a farming country. It is on a rolling hillside and in along the hillside there is these gulleys and draws. They don't try to farm the bottom of them, they form weed patches in them, and so during the hunting season, why, we would go to the different farmers and ask to come down through a draw.

Well, when we came, after we had proceeded down through the draw and came out, oh, I don't know, I don't even remember how far it was from the road, and started to turn back and get up on the road, why, we found these objects lying—

The Court: Approximately how far from the road?

(Testimony of Albert J. Osborne.)

A. Oh, 50 feet, possibly.

The Court: Oh. [26]

A. 50, 75 feet, something like that.

The Court: Is that a public road?

A. Yes, it is a county road.

The Court: County road?

A. Yes.

Q. (By Mr. Loney): I will ask you if you can see in this Identification 4 what appears to be the road?

A. I can't see it well enough to identify it. It looks like this terrain around there.

The Court: What were you hunting? Birds?

A. Pheasants. As we came up out of this draw, before we got to the road, there was kind of a bare place that I recall, kind of dry dirt more than anything else. I can't see the road. It isn't light enough for me.

Q. (By Mr. Loney): Can you see anything that looks familiar in any of these pictures?

A. Well, those are those typical draws that we hunted, yes, orchards on them.

The Court: You will have to keep your voice up.

A. I say, this is the typical draw.

The Court: Yes, all right.

A. And the orchards around where we were hunting.

The Court: I can hear you, but I didn't think Mr. Tugman could.

A. I'm sorry. And that is some more of the similar [27] terrain around there.

(Testimony of Albert J. Osborne.)

Mr. Loney: Thank you. I think I have no further questions.

Cross-Examination

By Mr. Tugman:

Q. Have you ever seen any bombs before, Mr. Osborne?

A. Well, when you say have I seen them, to handle them, you mean to be acquainted with them?

Q. Yes? A. No.

Q. Doesn't Mr. Coffey have one in his home?

A. He had a small type of a bomb that I had seen previously, but, to me, when you mean handling them or being familiar with them, I am not. I had seen it.

Q. What was the shape of that bomb that Mr. Coffey has?

A. With my hands I could show you. It is possibly that high and that large around (indicating). It does have—I think it has some fins on it.

Q. About how much does it weigh, do you know?

A. I don't recall handling it very often enough to be familiar with it.

Q. In shape, it tapers, does it not?

A. Yes, it does.

The Court: Mr. Osborne, you indicated how high. I [28] couldn't tell, I didn't see your lower hand there.

A. Probably 12, 14 inches.

The Court: About 12 or 14 inches?

A. Yes.

(Testimony of Albert J. Osborne.)

Mr. Loney: If your Honor please, we have the object, I think it is here, if you want me to get it. We have it in a trunk, because possibly, in talking to the Sergeant about it, it possibly has an active cap in it, so we didn't bring it in. It is a mortar shell.

Mr. Tugman: Mortar shell or a bomb?

Mr. Loney: No, mortar shell. I will have it at lunchtime, if you like.

Mr. Tugman: That is fine, thank you.

The Court: I think it would be a good idea to deactivate any bomb before you bring it in the courtroom here.

Mr. Tugman: I think so. We have two experts here.

Q. (By Mr. Tugman): Mr. Osborne, does this bomb look now the same as it did when you first saw it? A. No, it doesn't.

Q. In what respect is it different?

A. Well, it is much cleaner and, to my knowledge, there wasn't any hole in it of any kind, any more than it was partially covered with dirt and slightly corroded, oh, dull, anyway. [29]

Q. What were the ends like?

A. I don't recall that. I'm sorry, I don't. I didn't examine them very closely any more than to scratch them and see if they were lead.

Q. That is all you did, just scratch it?

A. Yes.

Q. And see if it was lead, is that correct?

A. Yes, I think I could truthfully say that they

(Testimony of Albert J. Osborne.)

would resemble a piece of conduit. If there was a hole, it would be full of dirt.

Q. What made you think it resembled a piece of conduit?

A. Well, I have had occasion to handle quite a bit of lead pipe. I have taken about 150 to 200 pounds of lead pipe out of my house that I bought and replumbed it. There is a lot of them that size, but they are not that heavy.

Q. Would you describe a piece of conduit? How big a hole does a piece of lead conduit have?

A. I would say there would be all sizes of them, although normally for plumbing they would be a lot of that big around, but they wouldn't have as thick a wall as that.

Q. They wouldn't? A. No.

Q. Would they have a much thinner wall? [30]

A. Yes, but they were full of dirt, I couldn't see you would identify them too much different than this, although I didn't notice that this was tapered.

Q. Well, now, do you remember a hole in that bomb or not? A. No, I don't.

Q. What made you think it was a piece of conduit? Don't conduits usually have holes in them?

A. Yes.

Q. You must have seen a hole, then, if you thought it was a piece of conduit, didn't you?

A. Well, do I understand you right, if I look through here and see a hole?

Q. Yes, at the end of the bomb?

(Testimony of Albert J. Osborne.)

A. Or you mean a round aperture on this end that would possibly be full of dirt? That wouldn't be a hole, would it?

The Court: Well, just so you will understand, I think what counsel means is whether there was any indentation in it?

A. Well, I think I could say that there was an indentation.

The Court: You are not referring that you could see clear through the thing?

Mr. Tugman: No, no.

Q. There was an opening there?

A. Yes, I would say—I don't recall it too much, I [31] didn't examine it too closely, but I think I can recall that there was an aperture there of some type.

Q. Well, do you remember telling me, and this is Page 8 of the deposition, that you remembered seeing something inside of the hole that wouldn't be natural to lead pipe unless it was pretty well corroded?

A. Oh, I may have said something about the lead pipe.

The Court: Let's see, I think you should lay the foundation by calling his attention specifically to the deposition, when and where it was taken, and perhaps he has that in mind. Do you remember when your deposition was taken?

A. Yes, I do.

The Court: Well, all right, go ahead.

(Testimony of Albert J. Osborne.)

Mr. Loney: Any objection, your Honor, I would like him to read the statement?

Mr. Tugman: I will read the statement, yes.

Q. You remember the deposition that was taken in Seattle on December 10, 1954. A. Yes.

Q. And at Page 8 of the deposition, do you remember being asked:

“Do you recall seeing what appeared to be a hole, maybe an inch and three-quarters, maybe an inch, in diameter?” [32]

And your answer to that question:

“I don’t exactly remember seeing a hole. I do remember seeing something inside of that that wouldn’t be natural to a lead pipe unless it was pretty well corroded. We didn’t attempt to dig the stuff out.”

The Court: What was the last?

Mr. Tugman: “We didn’t attempt to dig the stuff out.”

The Court: Oh.

Q. (By Mr. Tugman): Do you remember how deep that hole was, Mr. Osborne?

A. No, I don’t. Can I say there was an indentation. You pick up an object—perhaps to clarify myself and my statement—when you found this object, we took it up, turned it over, looked at it, decided it was lead. We were hunting, we wanted to go on, so I didn’t examine the object any more, to my knowledge, and from that date to now I

(Testimony of Albert J. Osborne.)

hadn't seen the object again except a picture view.

Q. Was there enough room in the hole at the end of the bomb to put your finger in?

A. I would doubt it very much.

Q. But there was definite evidence that there was a hole there? [33]

A. Yes.

Q. Of some depth?

A. Yes, I would say so. Yes, I would say yes.

Q. I see. Now, how long have you been coming over to the Pasco-Kennewick area to hunt?

A. Well, I worked here during the time in 1936, '37, '42, '43, and those were summer seasons.

Q. Did you have occasion to be in the Pasco-Kennewick-Yakima area during the period 1942 to 1947, '48?

A. Yes, two or three different summers I worked on construction work, road construction.

Q. Were you aware that there were any military bombing reservations in that area?

A. Not too much, any more than I was fairly well familiar with the Navy restrictions on their areas out of Pasco.

Q. What were these Naval restrictions?

A. They had signs up—they weren't fenced, they had signs up that it was a Navy reservation and "Keep Off," although we were limited to go to those during the working periods.

Q. I see. Why did they have signs there, do you know?

A. To keep the public off, I would say.

Q. Do you know what they used those areas for?

(Testimony of Albert J. Osborne.)

A. Most of them that I was around were landing areas, [34] airplane landing and take-off areas, small ports, airports.

Q. Do you know of the existence of any areas used for bombing, strafing?

A. Not personally, no, I didn't.

Q. Did you ever see any planes drop any bombs or hear any explosions after a plane dropped a bomb in any of these areas?

A. Not in this area around here. I did have an occasion to know of them dropping bombs up in around the Sprague Lake, Spokane, Cheney area.

Q. I see. So you did know that the Navy did use some of this area for bombing ranges, is that correct?

A. Yes, some of this area.

Q. When you lived in that area, did you subscribe to any papers in the Tri-City or the Yakima area?

A. No, I didn't, sir.

Q. Did you ever have any occasion to look at any of these newspapers?

A. I suppose.

Q. Do you ever recall seeing any warnings or stories published by the Navy in that respect?

A. No.

Q. Do you ever recall seeing any in 1950 or '51 or '52?

A. No, I didn't. [35]

Q. Would you say that this Exhibit 1 here, Plaintiff's Identification 1, was cylindrically egg shaped?

A. It is, I would say it is now, yes.

Q. You would say it is now?

A. Yes.

(Testimony of Albert J. Osborne.)

Q. Was it in the same shape when you picked it up?

A. I am going to only have to say I think so, because I don't recall too well the object in itself.

Q. In other words, it is about the same shape as Mr. Coffey's dud bomb that he has home?

A. This object is about the same as the dud that he has at home?

Q. Yes?

A. If you are going to get real technical, I am going to say no, because the other one was a more spherical shape and longer and larger, and I think the other one has a corrugation on it.

Q. I see. But they are very similar?

A. In a way, yes.

Q. In a way? A. Broad form, yes.

Q. Now, referring to the deposition again that was taken on December 10, 1954, in Seattle, and referring to Page 17, I will ask you if you recall making this statement in answer to a question asking if you recognized a [36] piece of a bomb that was shown you, which was marked as Defendant's Exhibit A at that time, and you stated:

“Well, I wouldn't recognize this as the piece I picked up any more than it looks like it. The lead we found was smooth on both ends and had not been torn and disturbed in any way.”

Your statement as to the bomb that you found was it was smooth on each end and had not been disturbed in any way?

(Testimony of Albert J. Osborne.)

A. That is my recollection, yes. I don't remember it being disturbed like this. As I recall, it was fairly smooth.

Q. Well, now, you said it was smooth on both ends and hadn't been disturbed in any way. Is this object here changed in that respect since you first saw it? A. I think so.

Q. In what respect is it changed?

A. Well, I don't remember any of this part being disturbed (indicating) or even on this end being actually battered or whatever you would call it, or blown off or something.

Q. Does it look like it has been blown off there?

A. It does slightly here some place. Of course, I happen to know that that would prejudice me to say that I [37] think it does look like it. If I hadn't never seen it before, I wouldn't know what had happened to it.

Q. Well, let me ask you, Mr. Osborne, have you seen this object at any time between the time that you picked it up and the time that you see it right now? A. No.

Q. Then, you haven't seen it in the interval at all?

A. Excuse me, possibly just outside the door here.

Q. Just outside the door here? A. Yes.

Q. So that the only recollection you would have of it would be the time that you first saw it?

A. That's right.

Q. Now, asking you again, have the ends of that

(Testimony of Albert J. Osborne.)

bomb been changed since the time that you first saw it?

The Court: Well, he wouldn't know that.

A. No.

The Court: He would only know whether it appears to be changed.

A. Just appears——

Q. (By Mr. Tugman): Appears to be changed?

A. I couldn't say whether it has or not.

Q. Does it appear to you now it is a little shorter now than it was? A. Very possibly. [38]

Q. Very possibly. At any rate, it wasn't as jagged at the time you first saw it?

A. That is my recollection, yes.

Q. I see.

Mr. Tugman: Thank you, I have no further questions.

Redirect Examination

By Mr. Loney:

Q. Mr. Osborne, Mr. Tugman has asked you about the bomb that Mr. Coffey has at home. Do you know whether or not that is a bomb or not?

A. No, I don't. From hearsay, I understand it is not a bomb. I understand it is a mortar shell. But when I made the statement in the deposition, he asked me if I had ever seen anything like that or a bomb before, I said, well, I had seen the one in—that Mr. Coffey had at his home, and at the time I thought it was a bomb.

Q. Did you know whether any bombs were being

(Testimony of Albert J. Osborne.)

dropped, whether there was a target range in this area, before Mr. Coffey's accident? I mean, to your knowledge at that time, did you know anything about any bombing ranges?

A. Do you mean of the specific—— [39]

The Court: Pardon me, I think you should define area a little more closely, because when he said he knew of a bombing range in the area, he was talking about Sprague Lake, which is a long way from this place. Area might mean all of Eastern Washington or Inland Empire.

A. That's right.

Q. (By Mr. Loney): Let me ask it this way: Did you know of a bombing range within, well, say, a radius of ten miles of Mr. Coffey's farm in Benton City, Washington?

A. I have heard there is a Zillah Bombing Range. I do not know the boundaries of it, I have never been on it, and that would possibly be in that distance, yes.

Q. Do you know where Zillah is?

A. I know where the town of Zillah is.

Q. Would Zillah, the town of Zillah, be within ten miles of Mr. Coffey's place?

A. Well, it would be close, but I doubt if it is ten miles. I think it is a little farther than that.

The Court: Where you found this object, I haven't got the place yet. It is near the Yakima River, but what town was it nearest?

A. Your Honor, there is a highway called the Inland Empire Highway that is on the north side

(Testimony of Albert J. Osborne.)

of the Yakima River that follows along the foot-hills. It was the old original Walla Walla-Yakima highway. And Mr. Coffey's place [40] is approximately a mile and a half or two miles north of that, although where we were hunting was between Mr. Coffey's place and this highway, and the highway parallels the river about a mile north of it. That is fairly close.

The Court: But where were you up and down the river?

A. We were about three and a half to four miles west of Benton City.

The Court: Oh, that is all right. I know where it is now.

Q. (By Mr. Loney): Were there any warning signs or any government signs at all in this area?

A. No, no, we were on private property. We had asked permission to hunt on this man's place and went through. When we came back, we were still on his property.

Mr. Loney: No further questions.

Mr. Tugman: I have no further questions.

The Court: That will be all, then, Mr. Osborne.

(Witness excused.) [41]

* * *

MRS. ELMER G. COFFEY

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Mrs. Coffey, you are one of the plaintiffs in this action? A. Yes.

Q. And your husband is Mr. Elmer Coffey?

A. Yes.

Q. How long have you been married? [65]

A. 30 years the 1st of April.

Q. And you reside on a farm near Benton City, Washington? A. Yes.

Q. Can you tell us the approximate location, the distance from Benton City and the direction?

A. It is about four and a half miles west of Benton City.

Q. And about how far is it from the Yakima River, do you know?

A. I imagine our ranch is about a mile and a half. I am just guessing, I am not very good judge of distances.

Q. You are right in the midst of a busy season there now, is that correct?

A. Yes, we are lambing.

Q. How many sheep do you have?

A. We are lambing 200 ewes, but we have 100 yearling lambs that we have held over. Of course, we can't tell how many of them will lamb. We have 300 ewes, you might say. [66]

(Testimony of Mrs. Elmer G. Coffey.)

Q. When did you move there, Mrs. Coffey?

A. 1950, about the 2nd of March.

Q. Where had you lived before moving to Benton City? A. Seattle. [68]

Q. Up until Mr. Coffey's accident, did you have, yourself, any knowledge of any bombing range within a radius of 10 miles?

A. We never even heard of a bomb before that.

Q. Had there been any articles or did you listen to any warnings of any kind or in the papers?

A. No.

Q. Did you see this object before the accident at any time?

A. I can't actually say that I seen it. I remember them saying, "Here is you some lead." I think they dropped it down in the yard or something. But I have never been very interested in his gun activities, and I know he took it and threw it in the basement and I don't know that I ever saw it to actually say that I could identify it. [69]

* * *

Mr. Tugman: I would like to move that any testimony she just gave as to where the bomb was found be stricken.

A. I don't know, yes.

The Court: That will be disregarded.

A. That is true.

The Court: I think I brought that on by asking the question. She doesn't know, I assume.

A. No.

(Testimony of Mrs. Elmer G. Coffey.)

The Court: Where it was. And the only thing she can testify to is as to how far she is from Benton City.

A. Yes. [71]

* * *

The Court: All right, proceed.

Mr. Loney: May this be marked as an exhibit?

The Court: Yes, all right.

The Clerk: Plaintiff's Exhibit 8 for identification.

Mr. Loney: Perhaps we might call Captain Smith, if your Honor please, just briefly for purposes of identifying some of these exhibits. [73]

E. B. SMITH

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

The Court: Do you wish him to step down there?

Mr. Loney: Yes, if I may.

The Court: He may as well stay there, then.

Direct Examination

By Mr. Loney:

Q. Your full name, sir?

A. Captain E. B. Smith, U.S.N.R., retired.

Q. Captain Smith, you were formerly in charge of the Naval Air Station at Pasco, Washington?

A. I was.

Q. Can you give us the time?

A. From its inception until August the 23rd, 1944.

(Testimony of E. B. Smith.)

The Court: Did you see you were an Army Captain?
A. Navy.

The Court: I'm sorry, I will not apologize because I was in the Army, but I will correct my impression.

Q. (By Mr. Loney): Captain, were you familiar with the location of certain target areas in that general vicinity?

A. Yes, I laid them out originally as outlined fields, flying fields.

Q. Referring there to what has been marked as Exhibit 8, [74] do you suppose that you could by pen mark in the areas that were target areas in Benton County, to the best of your recollection and from your map?

A. My best recollection is that this one labeled here as Richland was the only one that was used. Now I will try and convert that to this map, if you wish, if I can here.

Q. Please.

A. If I can. That is Section 13. See if we can get this. Range 28 and in Township 13. It must be this one here (indicating). That is a state road. This one right here (marking on exhibit).

Q. Then to your best recollection, there were no other ranges in use?

A. To my best recollection, that was the only one that we used.

Q. Now, were there any Army ranges that you know about?

(Testimony of E. B. Smith.)

A. Yes, there was one just north of Saddle Mountain.

Q. Would that have been in Benton County?

A. I do not know, I can't answer that. I think not.

The Court: That would be in Grant County?

A. I think so.

Q. (By Mr. Loney): Then on Identification 8, you have marked two circles in pen, and that indicates, to your best knowledge, the location of that target area in [75] Benton County?

A. Yes, sir.

Q. Now, you have two circles there. Is there any significance to that?

A. None, just to make it conspicuous.

Q. I see, fine. And that range, you would say, took up about a quarter of a section, is that about right, size?

A. That is correct, it was a quarter of a section.

Mr. Loney: That is all the questions I have of this witness.

Cross-Examination

By Mr. Tugman:

Q. What was that range or that area that you identified on the map here? This area here which was identified right here (indicating), I wonder if you would initial that, please, so that we will know?

A. (Witness complies.)

Q. What was that range used for there? What type——

A. That was used for dive bombing.

(Testimony of E. B. Smith.)

Q. For dive bombing.

Mr. Tugman: I have no further questions.

Mr. Loney: No further questions. I presume Captain Smith will be recalled later? [76]

Mr. Tugman: Yes.

The Court: All right.

(Witness excused.)

Mr. Loney: I have the legal description of the farm land owned by Mr. Coffey, your Honor, and we can superimpose that on this tract, if you have no objection.

Mr. Tugman: I have no objection.

The Court: All right.

Mr. Loney: May I borrow that pen? Let the record show now that I am marking with a wavy line an area on the map in Section 3, Township 9 North, Range 26, to indicate the approximate location of the land owned by the plaintiff in this action and on which his home is situated.

With that explanation, your Honor, I offer this map as an exhibit.

The Court: Do you have any objection?

Mr. Tugman: I have no objection.

The Court: It will be admitted, then. That is No. 8?

Mr. Loney: Yes, your Honor.

The Clerk: No. 8.

The Court: Yes. [77]

(Whereupon, the said map was admitted in evidence as Plaintiff's Exhibit No. 8.)

Mr. Loney: I might recall Mr. Oliver Osborne for the purpose of marking the location where the bombs were found.

The Court: Here, I can look at it afterwards. He has been sworn already, Mr. Granger, he testified this morning. You can hand him that and mark on it, if you wish.

OLIVER OSBORNE

having previously been sworn, resumed the stand on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Referring to Exhibit 8, Mr. Osborne, and showing you the location as pointed out on the map of Mr. Coffey's property, I am wondering if you would by this red pencil indicate the approximate location of the draw in which you and Mr. Osborne found these objects?

A. This is the Coffeys' property' (indicating)?

Q. Yes.

A. And there is an orchard on this corner and the draw would be bordering the orchard (drawing). Something in that location, as near as I expect I can place it. [78]

Q. You have indicated the draw crossing a road on that map, is that correct?

A. Well, yes, it crosses the road.

Q. And does it go down into the Yakima River?

A. I believe it does.

(Testimony of Oliver Osborne.)

Q. That is the approximate area where you found these bombs? A. Yes.

Mr. Loney: We have no further questions.

Mr. Tugman: I wonder if you could have the witness initial that, please?

Mr. Loney: Oh, surely, excuse me.

Q. Would you just put "O. O." on there?

A. Any place?

Q. Yes, that will be fine.

A. (Witness complies.)

Mr. Loney: Thank you.

The Court: Do you have any questions?

Mr. Tugman: I have no questions. [79]

* * *

RUSSELL W. McCAMMON

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Sergeant, you are a Sergeant First Class?

A. I am just a Sergeant, sir.

Q. Just a Sergeant. In the United States Army, is that correct? A. Yes, sir.

Q. And what organization are you attached to?

A. 62nd Ordnance Detachment, E.O.D., Camp Hanford, Washington.

Q. And what is your particular function with that organization?

(Testimony of Russell W. McCammon.)

A. I am an explosive ordnance specialist.

Q. Explosive ordnance specialist?

A. Yes, sir.

Q. And how long have you been trained for that occupation? A. Since 1951, sir.

Q. Before 1951, were you in any kind of an ordnance unit?

A. No, sir, I was in an engineer battalion before then.

Q. Had you had experience prior to 1951 with explosives? [81]

A. With explosives, but not with explosive ordnance.

Q. Can you explain?

A. Well, there is lots of difference between explosive ordnance and explosives. In explosive ordnance, a piece of explosive ordnance such as you have there. A block of T.N.T. isn't explosive ordnance.

Q. That is just an explosive? A. Yes, sir.

Q. In other words, ordnance has some particular meaning regarding shells? A. Yes.

Q. And equipment of that nature. Are you familiar with the range that Captain Smith previously identified, target range in Benton County? I will show you Identification 8 and show you the markings made by the Captain. A. Yes, sir.

Q. Are you familiar with that particular location? A. Yes, sir, I am.

Q. Have you had occasion to see any objects that

(Testimony of Russell W. McCammon.)

resemble these three pieces that I am asking that the Clerk mark for me?

The Clerk: Plaintiff's Exhibit 9 for identification.

Q. (By Mr. Loney): While you are marking those, I will refer to Exhibit 1 and ask you if you have seen this type [82] of object before?

A. Yes, sir, I have.

Q. Do you know what that is?

A. Yes, sir, I do.

Q. Could you describe what it is, please?

A. It is a 13 pound practice bomb.

Q. Do you know that this is a 13 pound practice bomb? A. I know it is part of one.

Q. There are different weights of bombs?

A. Yes.

* * *

Q. (By Mr. Loney): Sergeant, could you describe the [83] different weights of practice bombs?

A. Well, there is 4, 6, 10, 13, 20, 100. I believe 100 is the highest, which is a water-filled one.

Q. Do you know what kind of materials the 4 pound bomb has?

A. Mostly cast iron, sir.

Q. And the 6 pound, do you know what they are made out of? A. Cast iron.

Q. What are the 13 pound bombs made out of?

A. Lead composition of some sort.

Q. Lead composition. Will you just tell the Court how you are able to say that this is a 13 pound

(Testimony of Russell W. McCammon.)

practice bomb? Can you explain to the Court how you know that?

A. Just familiar to me, that's all.

Q. Well, do you know whether this is lead or cast iron? A. I know it is lead composition.

Q. How do you know that?

A. Well, from my handling of them.

Q. From the training that you have had in the service? A. Yes.

Q. And, now, this doesn't appear to be intact to your knowledge, does it? A. No, sir.

Q. And it appears to be partly missing?

A. It is. [84]

Q. Have you any way, then, of telling this initially was a 13 pound bomb?

A. Yes, the size of the nose of it here.

Q. The size of this nose? A. Yes.

Q. Would you state, Sergeant, whether or not in your opinion this bomb has been dropped from a considerable height, and I speak in terms of 1,000 or 2,000 feet. A. I couldn't say that.

Q. Can you tell by examining it what might have happened to that, or are you able to?

A. Well, those can be dropped from very low altitude and disintegrate, that is, break in pieces.

Q. Does the speed with which they are dropped have any significance?

A. Yes, sir, I would say the speed of the bomb, the speed of the plane, yes, sir.

Q. Well, could you state in your opinion whether or not this had been dropped from an airplane?

(Testimony of Russell W. McCammon.)

A. No, I couldn't.

Q. Do you know any reason why these marks would appear on it that do appear on it?

A. Well, from being dropped, I imagine, is the reason they appear on there, but I couldn't say what it was dropped from. It could have been drug across the ground and [85] done that.

The Court: I didn't hear that last statement?

A. It could have been drug over rough terrain.

The Court: Oh, I see, yes.

Q. (By Mr. Loney): Could you tell the Court how anyone could drag this across rough terrain and do this?

A. I don't know, they do some funny things.

Q. Well, would it seem probable?

A. No, it wouldn't seem probable.

Mr. Tugman: I am going to object to that. I think he answered the question before and I ask the last remark——

The Court: I will let it stand. You may go ahead.

Q. (By Mr. Loney): Well, Sergeant, in your experience with this type of ordnance, can you state whether or not from your examination of that object—you may examine it, if you would like, look at it—can you state whether or not anything on that object has any significance to you as an ordnance expert?

A. I can see it has been detonated.

Q. It has been, the explosive charge in there has been fired?

(Testimony of Russell W. McCammon.)

A. That's right, it has been rendered inert and the pin is gone. The tail fins are gone. Could have laid out in the area for sometime and erosion, the sand erosion, could have caused this smoothness on the end here. I [86] can see that it has been hammered.

Q. You have seen such ordnance that has been dropped from airplanes? A. Yes, sir.

Q. Is there anything about the nose, the large part of that object, that would look different than an object that had been dropped from an airplane?

A. No, sir, except that this is cleaned up.

The Court: This is what?

A. That this is cleaned up, cleaned out. When it is dropped, they are generally filled.

The Court: I see, yes.

The Clerk: Your Honor, I have marked Plaintiff's Exhibits 9, 10 and 11 for identification.

The Court: Oh, all right.

Q. (By Mr. Loney): Referring now to Exhibit No. 2, is there any difference between this object and the object that is marked 1 in so far as what it started out as?

Mr. Tugman: Your Honor, at this point I will object to any question until the objects have been identified as to what they are and where they come from and some identification made of them, some foundation laid.

The Court: Well, I think counsel can proceed this way if he wishes. Then, of course, if he doesn't connect it up, they won't get into evidence. The

(Testimony of Russell W. McCammon.)

Court will disregard [87] the testimony concerning them.

Mr. Loney: I will try and tie them in, your Honor.

The Court: Yes. What number is this?

Mr. Loney: This is No. 2, your Honor.

The Court: Oh, 2. Well, isn't that the one that the Osbornes identified as the one they picked up, or——

Mr. Loney: I don't believe they did, as I remember, no. I think these all came——

The Court: Oliver Osborne testified that Exhibit No. 2 looked like the one he picked up.

Mr. Loney: Yes, sir.

The Court: Didn't say it was the one. All right.

A. May I go ahead?

Q. (By Mr. Loney): Yes, Sergeant.

A. The retaining pin is still in this. It has a rock jammed in there. This is the retaining pin (indicating).

The Court: Oh.

A. There is a rock jammed there.

The Court: Is that the retaining pin?

A. Yes, sir.

The Court: Holds the charge in place?

A. Yes. It also has your primer casing here in it yet.

Mr. Loney: May I have that shotgun shell that you have just to illustrate to the Court?

(Mr. Loney goes to back of courtroom.) [88]

(Testimony of Russell W. McCammon.)

The Court: That is just a rock jammed in there?

A. Yes.

Mr. Loney: Your Honor, for illustration purposes, that is the charge they are loaded with, and it is an over-long shotgun shell, and I think, Sergeant am I correct, that this shotgun shell fits in here (indicating)?

A. That's right.

Q. And that there is a cap sits on top of it?

A. Yes, sir.

Q. And the force of striking the ground is supposed to strike the shotgun shell and explode it?

A. Detonate it, yes, sir.

Q. You will notice the object in the end of that, a rock and sand? A. Yes, sir.

Q. Does that appear to have been dropped?

A. Yes, sir, it does.

Q. Either a considerable height or with considerable speed? A. I would say so.

Q. Showing you Exhibits 10, 11 and 9, marked for identification, I will ask you if you know what these objects are?

A. That is the parts of the same bomb we had.

Q. Can you tell what has happened to that?

A. What has happened? [89]

Q. Yes.

A. I would say—well, how do you mean that?

Q. Well, if you picked that up and looked at it as an ordnance man, what would be your opinion as to the prior history of that object?

(Testimony of Russell W. McCammon.)

A. Just a piece of fragment from a 13 pound practice bomb.

Q. Well, does it appear to have been blown apart by an explosion or hammered apart or can you tell?

A. I can't tell. I would say from an explosion, though.

Q. That was Exhibit 9. Now, referring to Exhibits 10 and 11, I want to call your attention to the fact that these two exhibits fit together. Would you say that those were once a part of the same bomb?

A. I would.

The Court: That is 10 and 11?

Mr. Loney: Yes, sir.

A. I would.

Mr. Loney: Now I am going to have to ask a hypothetical question, Mr. Tugman, and I will have to bring in the other evidence later to tie it in. I will tell you that for your information.

Q. Assuming, Sergeant, that those fragments were found close together—when I say close, I mean within a radius of maybe 9, 10 or 20 feet—would you have an opinion as to how they might have been placed there? [90]

A. You mean from an explosion or from just being dropped?

Q. Yes, would you have an opinion on that?

A. Either could happen in this particular instance. You could drop that from a certain height and if it hit a hard object, it would. I have seen

(Testimony of Russell W. McCammon.)

them break in that many pieces and more without an explosion having occurred.

Q. But it would either have to have been dropped from a considerable height or have an explosion, is that correct? A. Yes.

Q. As an ordnance man, if you were to come across those objects lying in an area, we'll say, in a circular area of about a 25 foot radius and they were lying apart, would you have any opinion as to whether or not they had been dropped there from a height or whether someone had packed them there and tossed them?

Mr. Tugman: I am going to object to this line of questioning. I realize that counsel says that he is going to connect this up, but I would like to state my objection at this time.

The Court: Well, the record will show your objection, and I will permit the evidence, subject to motion to strike later.

Mr. Tugman: Yes, your Honor.

A. Well, from my standpoint, as far as my job is [91] concerned, I wouldn't consider these because there is nothing there that I have to consider. There is no explosive, it is just fragments.

Q. (By Mr. Loney): Well, I am speaking about how they might have gotten there, is all?

A. Well, I couldn't say that. It could happen either from being dropped or from an explosion.

Q. But you would think it would happen from one or the other, is that correct?

A. Until I found the nose of this, I would con-

(Testimony of Russell W. McCammon.)

sider that it happened from an explosion. If I found the nose to be intact, why, then I would think it would happen from being dropped from an altitude.

Q. In other words, you wouldn't know whether it exploded or was dropped, but you would think one or the other happened? A. Yes.

Q. And these, I believe you stated, are definitely in your opinion parts of a 13 pound practice lead bomb? A. Yes.

Q. To your knowledge, did the Army use this type of practice bomb?

A. Yes, I know they did. It is an A-N, that is, Army and Navy.

Q. Ordnance? [92]

A. I don't know whether they used them in the areas in question.

Q. Have you had occasion to run across these same type of practice bombs in Benton County?

A. Yes, I have.

The Court: Did I understand you to say, Sergeant, that this is the type used by the Army and Navy?

A. Yes, sir.

The Court: But you don't know whether it is used by the Air Corps, is that correct, is that what you say?

A. That's right, sir.

Q. (By Mr. Loney): At the particular time, 1943 to 1945, it would have been used by either the Army or the Navy, because there was no Air Force at that time? A. Yes, sir.

(Testimony of Russell W. McCammon.)

Q. Do you know whether these are in use at the present time? A. No, sir, I don't.

Q. Sergeant, would you mind stepping down to this map of Benton County? Are you able by looking at that map to orient your surroundings?

A. Yes, sir.

Q. Now, I believe you stated that you have found similar objects in Benton County?

A. Yes, sir. [93]

Q. Could you describe to the Court in what area you found them?

Mr. Tugman: I am going to object again here, your Honor. I don't know whether counsel is trying to introduce these objects that he has here or qualify them, but until we have the objects or some description of what the objects are, I think this testimony is incompetent and not relevant at all.

The Court: Well, are you asking him if he found objects similar to 1 and 2, Exhibits 1 and 2?

Mr. Loney: Yes, your Honor.

The Court: If you limit it to that. I don't think there is any question about the identify of those, is there?

Mr. Loney: The Sergeant has testified that they are all parts of a 13 pound practice bomb, and I am asking about the 13 pound practice bomb, if he has located any more of them.

The Court: What you are really asking is if he found any of this type of 13 pound practice bomb in that area?

Mr. Loney: Yes, your Honor.

(Testimony of Russell W. McCammon.)

The Court: Without reference to what is or is not in evidence or established here?

Mr. Loney: That is correct.

Q. Did you find any?

A. Yes, right in here between Route 410 and the railroad [94] spur right here (indicating), right along in this area here.

The Court: Better have him mark that and initial it so we can tell where it is.

Q. (By Mr. Loney): Sergeant, I think I should call your attention to something. I believe—my mistake.

Would you mind, with this red pencil, just drawing a broken line, a dotted, broken line, around the area in which you have found these objects?

A. (Witness complies.)

Mr. Tugman: Your Honor, I am going to object again. There is no proof here or no showing at all what type of objects these were. He says they were fragments of 13 pound practice bombs, but we have no description of the objects, no definite identify as to the place they were pinned down, nothing beyond the fact that they were objects and he thinks they were 13 pound practice bombs. I think there should be a further showing than that.

The Court: Well, he has testified here that what he calls 13 pound practice bombs are similar to 1 and 2, which are marked for identification and I assume will be in evidence when the plaintiff testified that that is the one that blew up and injured him. Isn't that what is going to happen here?

(Testimony of Russell W. McCammon.)

Mr. Loney: Yes, your Honor. [95]

The Court: So you may let the record show your objection, but I assume it is going to be connected up at this time. If it isn't, it will be stricken later on.

Mr. Loney: I can move, perhaps, that Identifications 1 and 2 be admitted in evidence, if you haven't any objection to their being admitted.

The Court: Well, the trouble is at this stage it has been shown that this plaintiff's brothers-in-law found those two objects, but it isn't shown that they had any connection with his injury or with this claim you have here, so unless counsel wishes to waive objection, I think you haven't properly identified them.

Mr. Tugman: I would probably waive to Identification 1, I have no objection to.

Mr. Loney: Well, we could offer that because they did have that in their possession.

The Court: Yes, No. 1 will be admitted, Plaintiff's Exhibit No. 1.

(Whereupon, the said object was admitted in evidence as Plaintiff's Exhibit No. 1.)

Q. (By Mr. Loney): Now, you have marked an area with a red broken line and you have initialed that, Sergeant McCammon, and that area is where you have found other [96] 13 pound practice bombs, am I correct? A. Yes, sir.

Q. Have you found them in an area outside of that location, do you know?

(Testimony of Russell W. McCammon.)

A. Yes, sir.

Q. Can you indicate any other parts of Benton County?

A. No, not in Benton County.

Q. Have you found any such type bomb any closed to Kiona, for example, than you have shown on the map?

A. No, sir, just that one area.

Q. Have you known of any being found out in this area where Mr. Coffey lives that is marked?

A. The only ones that were brought to our attention are the ones——

Q. In this case? A. ——in this case.

The Court: Only the ones in this case, did he say?

Mr. Loney: Yes, sir.

A. Yes, sir.

The Court: All right.

Q. (By Mr. Loney): You may resume the stand, sir.

Sometime in the first part of 1953, Sergeant, were you called to Mr. Coffey's property or some property near his?

A. The squad was, sir, I didn't go with [97] them.

Q. Oh, you didn't go with Captain Jackson?

A. No, I didn't go with him, I stayed in the office.

Q. I thought you had. Well, Captain Jackson is now over in Korea, isn't that correct?

A. Okinawa.

(Testimony of Russell W. McCammon.)

Q. Well, then, you have no personal knowledge where Captain Jackson got those?

A. Only what he told me from mouth.

Q. Well, don't answer this question right away because I presume counsel would like to object to it: I would like to ask you what Captain Jackson told you when he returned with some 13 pound bombs?

Mr. Tugman: I will object to that, your Honor.

The Court: Yes, I think that is hearsay. Sustain the objection.

Mr. Loney: May I say a word on that, your Honor?

The Court: Yes.

Mr. Loney: I had this feeling, that these gentlemen are ordnance experts for the United States Army and, as such, would seem to me to be speaking agents as to this type of ordnance and their statements would be admissions against the United States Government.

Mr. Tugman: Well, I would take exception to that. I think under this Tort Claims Act, the Government, if it is to be found liable at all, must be found liable under the [98] same circumstances that an individual would be found liable, and I don't think that the Tort Claims Act creates any and all Government employees agents of the Government.

The Court: Not for the purpose of admitting liability, I am afraid not.

Mr. Loney: There would be no admission of liability, just a statement of what happened, that he was given those bombs, and——

(Testimony of Russell W. McCammon.)

The Court: I think that would be hearsay as to what Captain Jackson told this witness.

Mr. Loney: Very well, your Honor. I understand the rule in Federal Court to be that it is not necessary to make an offer of proof, as long as the witness is here and we have discussed it with your Honor and advised your Honor what he would testify to, and, therefore, I won't make that offer of proof.

The Court: Yes, all right.

Mr. Loney: Unless your Honor wishes it.

The Court: No, I don't think it is necessary.

Q. How do you deactivate that type of ordnance, Sergeant? A. T.N.T.

Q. T.N.T.? A. Yes, sir.

Q. What does that mean? [99]

A. Just pile them up in a pile and we get so many and blow them up.

Q. Put a charge underneath them and blow them up? A. Yes, sir.

The Court: You don't have to take that core out of there?

A. We are not allowed to.

The Court: Oh.

Q. (By Mr. Loney): Sergeant, referring to Exhibit 1, do you discern any writing on that, printing? A. Right there, sir (indicating).

Q. You do, your answer is yes?

A. Yes, it is.

Q. You are indicating a spot on the bomb. Is that clearly visible, what you call clearly visible?

(Testimony of Russell W. McCammon.)

A. Well, for extended ordnance, it is, yes.

Q. And for an ordnance man to read it, perhaps? A. Right.

Q. Very well.

The Court: Where is it?

A. Right there, sir (indicating).

The Court: Oh, yes.

Q. (By Mr. Loney): Sergeant, if that bomb had been dropped and lay in one position for sometime, would that be visible to the naked eye, that type of writing, [100] or would it? A. To me, yes.

Q. It might not, might it not, also?

A. Yes.

The Court: What does that say? Can you read it now? I can see some letters, but I couldn't make out what it spelled.

A. Make out part of it, but that's all.

The Court: That is something that is stamped on when the bomb is made?

A. Yes, it could be a lot number, various things.

The Court: Oh, all right.

Mr. Loney: You may examine, Mr. Tugman.

Cross-Examination

By Mr. Tugman:

Q. Where were you stationed, Sergeant, during the period 1943 to 1946 or '7? Were you stationed in this area? A. Sir?

Q. Where were you stationed in 1943?

A. New Guiana, sir.

(Testimony of Russell W. McCammon.)

Q. And I presume you were overseas all during that period? A. Yes, I was.

Q. Have you ever had any actual experience with this type of bomb, in loading those bombs or arming them or [101] anything of that nature?

A. No, sir, not in loading or arming them. No, I wouldn't arm them.

Q. To your knowledge, this type of bomb is used for high altitude bombing, is it not, practice bombing?

A. No, sir, it isn't, to my knowledge, used for high altitude; I understood it was low altitude.

Q. Beg pardon?

A. I understood it was low altitude bombing.

Q. You mean 6,000 feet or something like that?

A. Well, yes.

Q. But it is used for straight, level bombing, is that right? A. Well, I couldn't say, sir.

Q. You don't know? A. I don't know.

Q. I see. Have you ever seen any of these things used? A. No, sir, I haven't.

Q. Are you called out in the course of your occupation to detonate bombs that people find?

A. We are called out to take care of them, yes, sir.

Q. Have you ever been called out in the Richland area to detonate bombs? A. Yes, sir.

Q. What kind of bombs have you [102] detonated? A. 100 pounders.

Q. Have you detonated any other kind of bombs?

(Testimony of Russell W. McCammon.)

A. Yes, we detonated some of those.

Q. And you are called out at people's request to detonate this type of bomb? A. Yes.

Q. Then, as I understand it, you get calls from private citizens who have found this type of bomb and they call you out to set the thing off, is that correct?

A. Well, they call us out to take care of it.

Q. By taking care of it, you mean de-arming it?

A. We take it away from their property, from the locale. Maybe we blow it in place if it is that dangerous.

Q. Now, you speak, Sergeant, of a pin that is in the firing part of the bomb here in the head of it. Is this the head of the bomb here (indicating).

A. Yes, sir.

Q. The big part. Do you see any place in Exhibit 1 here where a pin should go?

A. Yes, sir.

Q. Would you please show us where that is?

A. Right through here, sir (indicating).

Q. I see. And how does that firing mechanism work there? What sets the bomb off?

A. This point, it is just on impact, its inertia, fire, [103] point of detonating.

Q. What is the nature of that pin? Is it imbedded in there, is it solid? A. This pin?

Q. Yes. A. No, it isn't solid.

Q. Well, I mean can it be taken out?

A. Yes.

Q. In other words, it is not locked in there, is

(Testimony of Russell W. McCammon.)

that correct? A. No.

Q. I see. Is there anything else in there which sets the bomb off?

A. Yes, there is a retaining cap here (indicating).

Q. Retaining cap. And in the inside of the bomb, there is a shell? A. Yes, sir.

Q. Is this a shell inside of here?

A. That is part of one, sir.

Q. Is that the type of shell that was used in this type of bomb? A. Yes, sir.

Q. Now, I notice a metal object in here. What is that?

A. That is where your primer—this is your primer cap. However, your primer is gone from this one. [104]

Q. I see. What would have happened to the primer? Would it distintegrate upon the explosion?

A. Sometimes they do and sometimes they don't.

Q. I see. Now, how far is the pin from the end of the bomb, would you say?

A. Well, I would say a half inch, three-quarters of an inch.

Q. I see. How much metal is in the cap underneath the pin? A. How much metal?

Q. Yes? You said that there was a cap there next to the primer. A. Very little.

Q. Very little. And what kind of material is that made out of?

A. Well, some of it, I believe it is cast, I don't know just what material it is made out of.

(Testimony of Russell W. McCammon.)

Q. Is it the same material as the bomb?

A. No, sir.

Q. I see.

The Court: It isn't like the end of an ordinary shotgun shell?

A. Well, this is the end of the shell.

The Court: Brass?

A. No, sir, I have never seen any brass. Looks more like [105] a white metal or a hot metal affair.

The Court: Does this thing have an end on it here with a cap in the middle?

A. Yes, just like a shotgun shell.

The Court: Yes, that is what I mean.

Q. (By Mr. Tugman): Have you ever seen one of these 13 pound practice bombs that had not been exploded? A. Yes, sir.

Q. You are familiar with that type of ordnance?

A. Yes, sir.

The Clerk: Is it loaded?

Mr. Tugman: No, it is not loaded. Here is the load (indicating).

The Clerk: That will be Plaintiff's 12 for identification—or Defendant's 12 for identification.

The Court: Yes, that is Defendant's 12,

The Clerk: Defendant's 12.

The Court: I wonder if we shouldn't mark those others 12-A and B? They are all part of the same one?

Mr. Tugman: That would be a good suggestion, Yes, they are, your Honor.

(Testimony of Russell W. McCammon.)

Q. Showing you Defendant's Identification 12, have you seen any object of this nature before?

A. Yes, sir.

Q. Would you describe what it is? [106]

A. 13 pound practice bomb.

Q. This is the same thing as Plaintiff's Exhibit 1 which I just took from you? A. Yes, sir.

Q. I see. Now, what is the material that these things are made out of, do you know?

A. It is a lead composition, is all I know.

Q. A lead composition? A. Yes.

The Clerk: This is 12-A.

Q. (By Mr. Tugman): Showing you Identification 12-A, what is this item?

A. That is a retaining pin.

Q. Where does the retaining pin fit in relation to this bomb?

A. Right in this hole (indicating).

Q. I see. It just goes through this little hole here? A. Yes, sir.

Q. Now, would that retaining pin, Sergeant, fit Plaintiff's Identification No. 1?

A. If it is a different lot number, it wouldn't.

Q. I wonder if you would try it and see if you could say that the pin on that——

A. Yes, sir, I would.

Q. So these bombs would have been [107] identical? A. You mean——

Q. The same lot number? A. Yes.

The Clerk: Defendant's Exhibit 12-C.

(Testimony of Russell W. McCammon.)

The Court: What was B?

Mr. Tugman: B is the pin, your Honor.

The Court: The pin was A.

Mr. Tugman: The shell, I believe, must be B.

The Clerk: The shell is B.

The Court: Oh, all right, that is all right. I want to keep them straight.

Q. (By Mr. Tugman): Showing you Defendant's Exhibit 12-C, what is that?

A. That is your retainer for your round.

Q. Where would that fit in?

A. Right in here (indicating).

Q. It fits right in the nose? A. Yes, sir.

Q. Would the retainer fit into this Defendant's Exhibit 1-A?

A. It would if it hadn't been damaged.

Q. It has been damaged now so it will not, is that correct? A. Yes, sir.

Q. Will you please demonstrate how those fit into Defendant's 12? [108]

A. Your round goes in, see that little buffer there?

The Court: Yes.

A. See the little buffer in there?

Mr. Tugman: Yes.

A. Your round goes up against that. This goes in, this is grooved, your pin goes in there (indicating).

Q. I see.

A. This is grooved in line with your pin and your pin goes in there.

(Testimony of Russell W. McCammon.)

Q. I see. Now, before this Plaintiff's Identification 1 was exploded, the first mechanism in this Plaintiff's Exhibit 1 would have been intact, would it not?

A. The primer? I would say yes. Otherwise, it wouldn't have exploded.

Q. I see.

Mr. Tugman: I have no further questions.

Mr. Loney: I will stipulate with counsel that we can take that shotgun shell out of the record, if your Honor would like. Perhaps that is not a good thing to have.

The Court: What has that got in it, just ordinary smokeless powder?

A. Yes, it has. Black.

The Court: Black powder?

A. What we call a spotting charge. It has various colors. I believe there is yellow and purple and even red. [109]

Mr. Tugman: Perhaps I could ask the Sergeant if this could be disarmed now without danger to the Court?

A. No.

Chief Gunner J. B. Dickey, (From back of Courtroom): I will have to object to that.

The Court: Well, all right. I think the objection would be sustained. I think unless you have an empty shell, you better take that one out.

Does this type of power explode, does it detonate from a jar on——

A. Well, sir, that primer in that round detonates that charge of powder in there.

(Testimony of Russell W. McCammon.)

The Court: If you dropped that just right, it would go off?

A. Yes, sir.

The Court: Hit the cap.

Mr. Tugman: We can take this out, if you wish.

The Court: Yes, all right, I think that should be withdrawn.

The Clerk: Show it withdrawn. That is 12-B.

Mr. Tugman: I have no further questions.

The Court: Any redirect examination?

Mr. Loney: No, your Honor, that is all.

(Witness Excused.)

Mr. Dixon, will you take the stand, please? [110]

JAMES D. DIXON

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Your residence is Richland, Washington, Mr. Dixon? A. Yes, sir.

Q. And how long have you lived in the Tri-City area? A. 1946, sir.

Q. You are employed now by General Electric?

A. Yes, sir.

Q. You have noticed the objects that we have identified here today, particularly the one that is marked as Exhibit 1? A. Yes, sir.

Q. Would you mind looking at that object and

(Testimony of James D. Dixon.)

scratching it with your finger nail and feeling its weight and observing its shape?

A. It is a lead composition.

Q. Have you seen objects similar to this?

A. Yes, sir.

Q. Are you acquainted with Mr. Coffey, the plaintiff in this action? A. Yes, sir. [111]

Q. Did you know him prior to his accident?

A. Yes, sir.

Q. Did you or Mr. Coffey, before his accident, have occasion to discuss such an object or discuss bombs?

A. I never even knew he had one, sir.

Q. You have heard the Sergeant testify here today that those are 13 pound practice bombs. Have you had occasion to locate or find any of those similar type bombs? A. Yes, sir.

Q. Can you come down to this map of Benton County and indicate just generally? Can you find the places?

A. Not very good on maps, but I will give you a rough idea.

Mr. Tugman: Again, your Honor, I make the same objection to this testimony unless it is connected up.

The Court: Well, the record may show the objection. I will overrule it.

Q. (By Mr. Loney): You may show the area.

A. Well, I have found—let's see—the old road that cut off. Not familiar very much with this map. But I have found them at the side of the old con-

(Testimony of James D. Dixon.)

crete abutment on the range and I have also found them on the Benton City-Kiona cutoff over here on the side of the mountain. [112]

The Court: Do you have difficulty orienting yourself on the map?

A. Yes, never was very good on a map.

Q. (By Mr. Loney): Well, now, can you locate on this map, can you locate the Benton City cutoff road?

A. This, I take it, is the Benton City cutoff road (indicating).

Q. Going past the area marked Gross Cup?

A. Yes, I guess that is the road. I am not too familiar with it, I think it is.

Q. Can you locate what appears to be a mountain with an elevation of 1,405 feet?

A. This seems to be the mountain here which we——

The Court: Is this the cutoff road, is this the one you mean (indicating)?

A. That goes from Richland to Kiona.

The Court: From Kiona and comes in the back-door of Richland?

A. Yes.

The Court: Down the river?

A. It is in the area after you pass under the railroad underpass, the mountain is off on the right there. I have found them there.

The Court: I know where that is, if you can show it on the map. [113]

A. I have found some in this area and some in

(Testimony of James D. Dixon.)

this area (indicating). Just exactly which spot on this area, I couldn't pin point, but they are there along that plains area at the foot of that hill.

Q. (By Mr. Loney): Would you by a pen just show a circular area to indicate——

A. All the cases?

Q. Yes, sir.

A. Other than the bombing range?

Q. Yes, other than the bombing range.

A. Well, now, right here is a little gravel dump and this circle here might mean 300 yards, right or left, on the bottom of that grade there, that flat place (drawing).

Q. You have drawn now two areas?

A. I have found them in both places.

Q. For the record, you have drawn two areas with an ink line, and I wonder if you would put your initials on the map opposite each one of those areas?

A. This is not right the precise footage. (Initials drawing.)

Q. Now, as I understand your testimony, the two circles that you have drawn indicate approximately where you believe you found such an object as this 13 pound——

A. I have found them there, yes, sir. [114]

Q. At what point in time did you first become aware that these were bombs?

A. Well, the first, when I first came to Richland, I came to open a boat shop and was interested in any place that I could get hold of lead, and some-

(Testimony of James D. Dixon.)

body said you could find lead out on the old bombing range. So I went, I found out they were bombs, I didn't want any more to do with them.

Q. When you run across these objects, were you doing something else when you run across them?

A. Yes, sir, I go out in that general area quite often, go jackrabbit hunting, varmint hunting.

Q. Can you describe how you would find them, how they were on the ground?

A. Well, some of them would be just the tail fins and sometimes would be a fragment of a body, and that is the way you would find them. I have seen some that was almost as wholly intact as the one you have there on the table. Most of those were over near the bombing range, though.

Q. Did you ever discuss those with Mr. Coffey before his accident?

A. No, sir, I didn't, no, not until after he had his hand hurt, did I ever find out he even had one of them.

Mr. Loney: No further questions. [115]

Cross-Examination

By Mr. Tugman:

Q. How long did you say that you had been in the Richland area, Mr. Dixon? A. 1946.

Q. 1946. And you say that you have been out on the bombing range around Richland?

A. Yes, sir.

Q. You observed some signs out there, didn't you? A. No, sir.

(Testimony of James D. Dixon.)

Q. Quite a few people go out there?

A. Yes, sir.

Q. Have you ever heard or seen advertisements or anything in the newspapers regarding bombs?

A. No, sir.

Q. Or on the radio? A. No, sir.

Q. Or on the public schools, have you ever heard of anything like that?

A. No, sir, other than hearsay.

Q. Do you know of your own knowledge that there have been publications and campaigns relating to these low bombing ranges?

A. No, sir.

Q. You don't know that. You have been out to this range [116] yourself quite a few times?

A. Yes, sir, I go out to target my rifles in there, sir.

Q. Do quite a few people go out to that range?

A. Yes, sir.

Q. Do quite a few people take lead, and so on, from that range?

A. Just how many, I don't know, sir. Some do.

Q. Do you know of your own knowledge that some people take off pieces of bombs and that type of thing, take them home?

A. I have seen them in their homes.

Q. Did you say that you had one of them yourself? A. No, sir, I got rid of one I had.

Q. You did have one? A. Yes, sir.

Q. What was its nature?

A. About the same one as Mr. Coffey had there.

(Testimony of James D. Dixon.)

Q. I see. Quite a few people do go out and take those things off, is that correct?

A. I suppose they do, sir. I don't know just how many do. They make sinkers out of them.

Q. Is it general knowledge that there is a bombing range near Richland?

A. Well, a few of the men might know, but I don't think the majority of the people realize that there is an old [117] bombing range out there.

Q. Do you know? A. I do now.

Q. Have you known when you have gone out there?

A. I did when I was told that there was an old bombing range out there. I didn't know it until then.

Q. When were you told?

A. When I first came to Richland.

Q. How were you told?

A. Fellows in the area said that there is lead out there, some fellows making sinkers for the fishing kits.

Q. Who told you it was a bombing range? How did you find out it was a bombing range?

A. They just said it was an old bombing range.

Q. Who said——

Mr. Loney: I think this might be a little bit objectionable.

A. I don't know the man's name.

The Court: He has answered now.

Mr. Tugman: What I was getting at, your Honor, is that I was trying to show knowledge of

(Testimony of James D. Dixon.)

campaigns that the Armed Forces have had from time to time, publicizing the fact of these bombing ranges and of this danger to the public. That is what I am trying to get at.

The Court: He has testified to that, that he didn't [118] know anything about the campaigns, I understood your testimony to be.

A. Just the ones that I have learned from were old members that have been here in the Hanford construction days, hear them say on the buses that there is an old bombing range out there, and that's all.

The Court: All right, go ahead.

Mr. Tugman: No further questions.

The Court: Any questions, Mr. Loney?

Mr. Loney: No, your Honor.

The Court: That is all.

(Witness Excused.)

Mr. Loney: Mr. Frederick.

EMMETT N. FREDERICK

called and sworn as a witness on behalf of the plaintiffs, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. Mr. Frederick, you are a mechanical inspector for the Army Engineers and you are now located in Mountain Home, Idaho? A. That is correct.

(Testimony of Emmett N. Frederick.)

Q. At the air base there. Did you know Mr. Elmer Coffey in 1952 and 1953? [119]

A. I did, yes.

Q. Were you at his home when he suffered the accident?

A. I was with him at the time, yes.

Q. Can you tell the Court what you were doing that day?

A. Yes, I went out there to cast .38 special and 30-06 bullets, the lead.

Q. Did Mr. Coffey have a hobby?

A. That's right, he did.

Q. What was that hobby? A. Reloading.

Q. All right, excuse me for interrupting. What did you do after you got out there? What, generally did you do?

A. Well, we were casting both 30-06 and .38 specials at the same time. He was throwing them with one mold and I was with the other. And he mentioned that he would like to increase the muzzle velocity of some up to approximately 3,000, and I said, "Well, the lead that we have here is too soft for that." And he said, "I think I have some hard lead in the basement." And he went in and brought out this dark looking object, it was dirty, and I asked him what it was and he said he didn't know. And it was dirty, we both agreed that we should clean it before we put it in the lead pot.

So he proceeded to clean it, I think he beat it with a hammer for awhile, to get the stuff off that was [120] on the outside of it, and then he had a pin,

(Testimony of Emmett N. Frederick.)

or I think it was a quarter-inch bolt, that he was scraping some stuff off the end, and then he started to drive it, and the next thing I knew the thing blew up.

Q. How close were you to him?

A. Well, just at the time it exploded, I stepped over to turn the lead pot down, and I don't know what would have happened if I didn't, but I had been looking right down at him prior to that. And at first I thought the back of my head was blown off, and I felt and found that that was all there, and I see Elmer crouched down holding his hand.

Q. And after the explosion, you took Mr. Coffey to the hospital?

A. I took him into the hospital, into Richland, yes.

Q. Did you see the object that has been marked as Exhibit 1? Do you recall seeing that object before or one similar to it?

A. Well, one similar to it. It was not quite as clean as this.

The Court: Is that 1 he is looking at?

Mr. Loney: Yes, sir.

A. The end of it didn't look like this. It seemed to be a lot of gravel around the end of it here (indicating).

Q. On the object that exploded and caused the injury did [121] you see any writing of any kind or markings?

A. You couldn't see anything on it. It was dirty, it was covered with dirt. Is this the same one?

(Testimony of Emmett N. Frederick.)

Q. Well, I think the testimony will later show it is.

Mr. Loney: Is that right, Mr. Tugman? This is the one you got from Mr. Coffey?

Mr. Tugman: That is No. 1, that has been admitted, yes.

Q. (By Mr. Loney): Have you ever seen an object resembling this? A. No, I have not.

Q. Identification 12. Was there anything about that object, Mr. Frederick, that led you to believe at that time there might be any explosive charge in it? A. No, none.

Q. You didn't have occasion to ever find any of these yourself, did you?

A. No, I have not, the first one and the last one I have ever seen.

Mr. Loney: You may inquire.

Cross-Examination

By Mr. Tugman:

Q. You say this is the first one and the last one of this type of bomb that you have ever seen? [122]

A. Outside of here, yes.

Q. Outside, you mean, this Exhibit 1?

A. The one I had in my hand.

Q. That is the only one of those that you have ever seen?

A. Yes, sir, that is correct.

Q. I see. Then, you haven't seen any of these others around this area where you were pointing, is that correct?

(Testimony of Emmett N. Frederick.)

A. I wasn't pointing at any particular area.

Q. I mean, this is the only one of this kind?

A. The one that I had in my hand.

Q. That is the only one that you have ever seen?

A. Uh-huh.

Q. Any place at any time?

A. That's right.

Q. Now, did this object change at all between the time that you first saw it and after the time that Mr. Coffey had his thumb blown off?

A. Well, it is about two years now, I believe, and I didn't pay too much attention to it, outside of the fact that it was dirty.

Q. It was dirty? A. Uh-huh.

Q. Now, you stated that Mr. Coffey had a pin and was cleaning off the ends of the bomb? [123]

A. A quarter-inch bolt, I believe it was.

Q. And he was cleaning the ends of the bomb off?

A. He had beat it was a hammer and then he was scraping at one end.

Q. Do you know which end he was scraping?

A. No, I don't,

Q. Was it the large end or the small end?

A. I couldn't honestly say.

Q. I see. Was he scraping the hole in the bomb or not?

A. I didn't observe any hole. It was sort of an indentation, looked like sort of a low spot.

Q. Did you notice what color the low spot was?

A. No, I didn't. It was dirt.

Q. About the same color——

(Testimony of Emmett N. Frederick.)

A. Looked to me like it was dirt on the end of it.

Q. Looked about the same color as the bomb as a whole, is that right?

A. Yes, just about, and he had cleaned a lot of it off in beating it with a hammer and then he was prying at the end.

Q. Now, did the hole go clear through the bomb or not?

A. Well, as I see now, it did, but at that time there was no hole in it.

Q. You don't remember, your recollection doesn't carry back to know whether the hole went clear through or not? [124]

A. Well, there was no indication to me that there was a hole in it.

Q. I see. What was he beating this bomb for? How come he was doing that?

A. To get the dirt off of it so we could melt it down.

Q. I show you the exhibit here, does that explain all those indentations and marks in the exhibit?

A. I wouldn't say that. There is a few small ones here that look like maybe hammers, but the rest of these I couldn't identify.

Q. And how did he actually explode the thing?

A. Well, I imagine when he hit the bolt with the hammer, I imagine that is when it exploded.

Q. I see. Did he have any conversation with you immediately before he hammered the thing, hammered this?

(Testimony of Emmett N. Frederick.)

A. No, I had the lead pot going, he was cleaning it off. He was working, he was down on his knees or squatting down, and there was no particular conversation.

Q. You didn't actually see him doing it, then, did you? A. Cleaning this?

Q. Well, driving the bolt through the hole in the bomb?

A. What actually hit it, no. It is probably very fortunate that I didn't, I would have got hit in the face if I had. I was watching and he was scraping away at the end. Which end, I don't know. [125]

Q. I see.

Mr. Tugman: I have no further questions.

The Court: Any other questions?

Mr. Loney: No, your Honor.

The Court: Where were you, in the basement?

A. No, we were outside his house, outside the door. I imagine we were about 15 or 20 feet from the back door.

The Court: When was that, what month?

A. It was in February, and I think it was just approximately around noon.

The Court: Oh, you had the lead pot melting the lead outside?

A. We had the lead pot outside.

The Court: Were you firing it?

A. It was a butane pot.

The Court: It was a gas——

A. A regular plumber's furnace.

(Testimony of Emmett N. Frederick.)

The Court: Gas operated?

A. Yes, butane gas.

The Court: Yes. Anything else?

Mr. Loney: No, your Honor.

Mr. Tugman: Just one further question:

Q. Why do you do this outside?

A. Well, it is not advisable to use a butane gas open flame inside, and it wasn't too cold. [126]

Q. I see. Because of the fire, then, you take it outside? A. The fire, yes.

Mr. Loney: That is all, Mr. Frederick.

(Witness excused.)

If your Honor please, I would like at this time to publish a deposition of Mr. Floyd McKnight.

The Court: All right. [127]

* * *

DEPOSITION OF FLOYD McKNIGHT

(Whereupon, Mr. Tugman read the questions and Mr. Loney read the answers of the deposition of Floyd McKnight, as follows.)

Q. Would you state your name, please, sir?

A. Floyd McKnight.

Q. And where do you live, Mr. McKnight?

A. I live out here at 5600 North Lewis.

Q. Do you have a rural delivery box number?

A. Route 8, box 200.

Q. What is your business or occupation?

A. I have a little grocery store there.

Q. At this address? A. Yes.

Q. How long have you lived in Tulsa?

(Deposition of Floyd McKnight.)

A. I come here the 7th of August.

Q. Of 1954? A. Uh-huh.

Q. And where had you lived prior to that?

A. Benton City, Washington.

Q. How long had you lived at Benton City, Washington. [129]

Q. And how long had you lived at Benton City, Washington? A. Ten years.

Q. Where had you lived prior to that?

A. Arkansas, over here at Huntsville, Arkansas.

Q. What type of work were you doing in Benton City?

A. I worked on a fruit ranch for about three years.

Q. Was that up until the time that you moved to Tulsa?

A. No, I was a ditch rider for the Sunnyside Irrigation District before I came here.

Q. And how long had you been a ditch rider?

A. Four years.

Q. Now, to be sure we get it straight, for the four years preceding your coming here, you were working as a ditch rider, is that correct?

A. That's right.

Q. Just what is a ditch rider, Mr. McKnight?

A. Well, I ride the ditches and see that each man gets his equal amount of water for irrigation purposes and maintain the ditch and keep that up. [130]

Q. And when you say "each man," you mean——

A. Each farmer.

Q. Each farmer.

(Deposition of Floyd McKnight.)

A. That has water from this canal.

Q. Under this irrigation plan? A. Yes.

Q. Now, sir, did you have occasion while doing this work as a ditch rider to find some unusual objects in a field?

A. When I found that was before I went to ditch riding.

Q. Oh, I see. When did you find these objects?

A. I believe it was in 1951, the fall of '51.

Q. What were you doing at that time?

A. I was working for W. L. Wagner, fruit rancher.

Q. How do you spell Wagner?

A. W-a-g-n-e-r.

Q. What kind of work were you doing for him?

A. Just farm work.

Q. What time of day or night was it that you first ran across these objects?

A. Well, sir, that I couldn't say. I was making trips over there daily and I just picked them up at odd times, running backwards and forth, and I wouldn't know right offhand just to the [131] time of day it was.

Q. Where was it that you found them? You say you were making trips "over there."

A. Well, they were on the Livengood place there on the pasture that I had rented from him.

Q. Is the Livengood place a ranch?

A. Yes, it is. It is a partly improved ranch, but he had some pasture there that I rented from him.

Q. What were you leasing this land for?

(Deposition of Floyd McKnight.)

A. I paid him by the head.

Q. No, I don't mean how much; for what purpose?
A. Pasture.

Q. For your cattle?
A. Yes, uh-huh.

Q. And was this right next to the Wagner place, the Livengood place?

A. Adjoins the Wagner place, yes, it does.

Q. Where, exactly, did you find these objects?

A. Well, they is a canyon that goes up through there.

Q. Up through where?

A. Through this pasture that I had leased, and around the edges of that, more or less, just surrounding the edges of this canyon on each [132] side. They canyon was small. It probably wasn't over 50 yards wide, you know, with the bushes and all that was grown up there.

Q. Over what area did you find these objects?

A. Aproximately three acres.

Q. And how many of them would you say that you found?

A. Twelve or fifteen, if they were all put together. They was more pieces than that, but I would say they was around that many, if they was all put together.

Q. Were some of them not put together?

A. That's right.

Q. What was the condition of those that were not put together?

A. Well, they was some pieces as small as two inches in diameter.

(Deposition of Floyd McKnight.)

Q. Some of them were broken up, is that what you mean?

A. Yes, and practically all of them. I only had about two that wasn't anything like all bad, the whole thing.

Q. Complete?

A. Yes, battered up and busted.

Q. Let's clarify that. How many were there of [133] twelve or fifteen that were complete?

A. Only about two.

Q. Were the battered ones battered the same way?

A. Well, no, not exactly. They seemed—they had hit on the big end. They were kind of bottle shape and——

Q. Just a minute, before we get started into that. Maybe you better describe these objects for us. Just describe them.

A. Well, they were more or less the shape of a—I would say a milk bottle, a quart milk bottle, and they, naturally, I suppose, would hit on the big end and they were most of them battered just like, you know, more or less flattened out on the bottom, and, well, they was just all shapes, those pieces were, in different sizes. That was the main thing.

Q. About how long were they, Mr. McKnight?

A. I would say around twelve inches long, just approximately. I never measured one to be sure.

Q. Were those about like a milk bottle?

A. Yes, that's right.

Mr. Tugman: Well, unless this testimony is

(Deposition of Floyd McKnight.)

qualified a little bit more, I would object to it, your Honor. So [134] far, we are talking just about objects that look like milk bottles and we just don't know what they are or where they were found.

The Court: They were found on the Livengood place, next to the Wagner place, as far as we can tell. I think we should continue on. The record may show your objection, but I will overrule it at this time.

(Reading of deposition continued.)

Q. How large were they at the largest point in width? In diameter?

A. I would guess in the neighborhood of three inches.

Q. And how large were they at the smaller end?

A. Around two inches. I would imagine they would vary about one inch.

Q. What material were they made out of?

A. Lead.

Q. Were they solid?

A. No they had a hole, through the middle.

Q. When you say a hole through the middle, do you mean running from one end to the other?

A. Yes, uh-huh.

Q. How large a hole was it?

A. About half an inch, I would judge.

Q. Now, then, was the hole empty or full? [135]

A. It was empty.

Q. Could you see all the way through the hole?

A. No. No, but those that were busted, you

(Deposition of Floyd McKnight.)

could just tell there had been a hole there, and on this larger end it looked like when it was dropped, it shattered or battered up to even if there was a hole there, it would have been battered and filled up with dirt and you couldn't have saw through it.

Q. Were there any of them that you couldn't see through? A. No.

Q. What was the nature of the material blocking the passageway? What was in the hole?

A. Just dirt and gravel and some rocks, just wedged right in there.

Q. Now, as I understand it, all of them were smashed or battered at the large end of this cylinder? A. That's right.

Q. Was there any writing or anything on the cylinder?

A. None, except one the boys found that came out there and they did find some numbers on one, but they said they were definitely Naval bombs, but [136] that is the only one that I saw that had any marks on it. Fact of the business, I had never noticed that until they found it themselves.

Mr. Tugman: I am going to object to that.

The Court: Well, I think the statement that somebody else made that they were Naval bombs should be stricken and disregarded. It will be stricken; the rest of the answer stands.

(Reading of deposition continued.)

Q. Was there any writing on any other one?

A. No.

(Deposition of Floyd McKnight.)

Q. Were there any signs or symbols or marks on any of them? A. No.

Q. When you found these, were they lying on the ground or were they imbedded, or just what condition were they in?

A. Well, some of them were imbedded there, oh, approximately three or four inches down.

Q. Into the ground? A. Uh-huh.

Q. And how were the others?

A. Some scattered pieces were laying right on top of the ground, just pieces. [137]

Q. As I understand from your prior testimony, some of them were completely smashed, strewn all over, is that correct? A. That's right.

Q. Did you examine the pieces of those that were smashed and strewn?

A. Well, not too much, no.

Q. In the examination that you did make of them, what did it disclose? What can you tell us about them?

A. Well, I don't know that there is much to tell. They was more or less mangled and they varied in size from two to three inches square and triangle and every shape.

Q. What was the condition of the soil?

A. Well, it was rough ground. It wasn't farm-able land, because that is why it was pastured. It wasn't good for orchards or anything.

Q. Was it soft or hard ground?

A. It was hard ground.

(Deposition of Floyd McKnight.)

Q. Was it rocky? A. Yes, it was.

Q. Were any of the small ends of these cylinders smashed in, Mr. McKnight?

A. No. No nothing more than there were some of [138] them that were busted completely open, but the small end didn't seem to have been battered, banged up, in any way, nothing more than just busted completely open, wide open.

Q. Those that you found stuck in the ground, which end was stuck in the ground?

A. The big end.

Q. Now, then, Mr. McKnight, you told us that you found these over an area of about three acres?

A. Yes, I judge about that.

Q. What is your best estimate of the distance between the closest of the ones that you found?

A. I would say around twenty-five feet.

Q. Is that the closest any of them were to each other?

A. I believe so. I believe so as far as scattered pieces. Any two of the larger ones, they wouldn't have been that close.

Q. What is your best estimate of the distance between the two farthest cylinders or pieces? Those that were farthest apart?

A. They would be not over 100 yards.

Q. Over 100 yards? A. Not over that.

Q. Would it be much under 100 yards? [139]

A. Well, some of them, but the farthest one, I wouldn't think, the farthest east, I don't believe would have been over 100 yards.

(Deposition of Floyd McKnight.)

Q. You stated it wouldn't be over 100 yards——

A. No.

Q. ——is that right?

A. I wouldn't think so.

Q. About how far would it be from the one at one edge of the field to the one at the farther edge of the field?

A. I would say that is about it.

Q. About what, Mr. McKnight?

A. About 100 yards.

Q. How much would you say these objects weighed, Mr. McKnight?

A. I would judge in the neighborhood of five pounds. Now, that is just an offhand guess. I never weighed one and, fact of the business, like I said, with only two whole ones which I had, but I think around five pounds. It could have been heavier quite a bit than that, but I just—that would just be my judgment.

Q. Now, Mr. McKnight, did you, at my request, draw a diagram in which you set forth the dimension and general shape of these cylinders? [140]

A. Yes, I did, to the best of my knowledge.

Q. Now, this yellow piece of paper marked Exhibit "A," to which you have signed your name, is that the drawing you made for me?

A. Yes, it is.

Mr. Athens: Okay, we will introduce that into evidence.

(Deposition of Floyd McKnight.)

Mr. Loney: I think that is right here.

The Court: Well, the Clerk will mark it as an exhibit.

Mr. Loney: Should I remove it from this, your Honor?

The Court: Yes, you may remove it.

The Clerk: Plaintiff's Exhibit 13.

Mr. Tugman: It would be for identification, wouldn't it?

The Clerk: For identification.

The Court: For identification.

Mr. Loney: You have seen it, Mr. Tugman?

Mr. Tugman: I haven't seen it. No, I haven't seen it.

I presume he means this is a hole here, is that correct (referring to Identification 13)?

Mr. Loney: Yes.

Mr. Tugman: I guess that is what it is. I have no [141] objection.

The Court: You have no objection?

Mr. Tugman: No.

The Court: It will be admitted, then.

It is time for recess. We have been in session an hour and a half. Court will recess for ten minutes.

(Whereupon, the said drawing was admitted in evidence as Plaintiff's Exhibit No. 13.)

(Whereupon, a short recess was taken.)

The Court: Let's see, we are still on Page 11 of the deposition, aren't we?

Mr. Loney: Yes, sir.

(Deposition of Floyd McKnight.)

The Court: This exhibit was admitted, I think, wasn't it? Yes, 13. Let's see, we are at the bottom of Page 11.

Mr. Loney: Yes, sir.

The Court: Or on 12?

Mr. Loney: The last question on 11.

(Reading of deposition continued.)

Q. Mr. McKnight, did you ever clean the hole out of any of these cylinders?

A. No, I didn't. Fact of the business, I was really afraid of them after I found out about [142] this guy getting hurt with this one.

Q. Let me ask you this question: Did you have any reason to believe that they might be dangerous?

A. Not until after he got his thumb blown off from this one.

Q. At the time you found them, did you have any reason to believe that they might be dangerous?

A. None whatsoever, no.

Q. What did you do with them?

A. I threw them back in a pile of junk that I had there and I sawed one with a hacksaw and made a little washer for an outfit that I was fixing there for the weir blade, for the water delivery.

Q. You cross-sectioned it, in other words?

A. Yes, I did.

Q. Did you use these for any other purpose?

A. No. No, I didn't bother them.

Q. How many of them did you take with you?

(Deposition of Floyd McKnight.)

A. Oh, I would imagine they was a dozen, altogether, twelve altogether.

Q. That you took home with you? A. Yes.

Q. Did you pick them all up at the same time? [143] A. No.

Q. Over what period of time did you pick them up?

A. Oh, just about three or four months, something like that, just different times that I was crossing back across the pasture and I would pick them up here and there.

Q. Mr. McKnight, what was the color of these objects?

A. They were just a dull lead color, the best I could describe one.

Q. Were they readily visible?

A. Well, you would almost have to be looking for them or just stumble right on one, the way they could be hidden. They was lots of grass there growing. They wouldn't be shown up for any distance, no.

Q. Were there any fins on any of these cylinders? A. No, they wasn't.

Q. Was there a nose on any of them?

A. No.

Q. Were there any depressions or indentations or slots to which anything might have been attached to these fins?

A. Nothing more than right on the big end, they looked like, after I examined one a little [144] closer, that they were a pin that held something,

(Deposition of Floyd McKnight.)

like a shotgun shell or firecracker, right in the big end there.

Q. In the hole that you were telling us about?

A. Yes, uh-huh.

Q. This pin, which direction did it go?

A. Just directly through the big end of it, straight through.

Q. Was it perpendicular to the hole?

A. Yes, that's right.

Q. What kind of a pin was it?

A. Just a steel pin.

Q. At any time, in any of the holes in any of these objects, did you find the pin going through anything?

A. No. No, I didn't examine them that close.

Q. You stated that the pin went through a shell or a firecracker there?

A. Yes, they was some red paper in there, looked more or less like it could be around a firecracker or shotgun shell, something of that sort.

Q. If I understand you correctly, there was a wrapper? A. Yes, uh-huh. [145]

Q. A red paper wrapper?

A. Yes, that's right.

Q. How many of these red paper wrappers did you find?

A. Oh, I imagine five or six, something like that. Those that were completely blown up, you didn't see no sign of that.

Q. Now, in which ones did you find the wrapper?

A. The ones that just wasn't busted open and

(Deposition of Floyd McKnight.)

the big end wasn't completely busted open, maybe had been broke in half and part of the paper would be sticking up there.

Q. Mr. McKnight, if they had been completely bursted, there was no paper, is that correct?

A. That's right.

Q. If they were intact, there was no paper?

A. No.

Q. Is that correct? A. Correct.

Q. It was only where there was only half of the cylinder left, that the paper protruded, is that correct? A. Yes, uh-huh, that is right.

Q. And was it still in the shape of a cylinder, the paper? [146]

A. Uh-huh, yes, it was.

Q. Do you own a shotgun? A. Yes, I do.

Q. With relation to the size of a shotgun shell, what size was this wrapper?

A. I judge it would be about the size of a .12 gauge shotgun shell. It might be larger, but that would be my guess.

Q. Was there a Navy air base near the Wagner place?

A. I didn't know just where it was. These boys, these soldier—Army soldier boys, they told me they were one just across the mountain over there, but just the exact location I wouldn't know that.

Q. Are you familiar with the location of a field used by the Navy for a bomb target practice?

A. No, no, I am not.

Q. After you took these objects home with you,

(Deposition of Floyd McKnight.)

when was the first you heard anyone say anything about them?

A. I didn't even realize them being dangerous until this here Coffey, he was one of my water users that I delivered water to, and I heard that he had gotten blown up with something [147] over there, and I thought it was dynamite and I went by to see him and he was telling me about some object that he was fooling with and it blew up on him, and he taken me and showed me a piece he had left, and I said, "Well, Jesus, I have got some of those over there and I sawed one in two with a hacksaw." And that was my first time even thinking anything about them being dangerous.

The Court: I think that part about what Mr. Coffey told him should be stricken. The fact that he saw a piece over there should stay, what he saw over there.

All right, go ahead.

(Reading of deposition continued.)

Q. When was that?

A. That was in 1953. I believe it was June of '53. I am not positive.

Q. When did Mr. Coffey have his accident?

A. I believe it was in June of 1953, wasn't it?

Q. What did you do, Mr. McKnight, when you heard about Mr. Coffey's accident?

A. Well, I gathered those pieces that I had very carefully and I taken them off up a little old canyon of a thing there and I buried them, so the boys

(Deposition of Floyd McKnight.)

wouldn't get hold of them. I had [148] some boys there and I was afraid they might get to playing with them.

Q. Your children, you mean? A. Yes.

Q. Where had they been all this time?

A. They had been off there in the junk pile at the house, just junk there, odds and ends.

Q. When was the next you heard of them or saw them?

A. Well, Mr. Coffey, he wanted to get hold of some and I went up there and dug out two or three pieces, and I don't remember the exact amount, but I taken some over there to him.

Q. When was it that you saw the Army or Navy people?

A. Well, it was just shortly after that he got his—got blown up with this one and there were three Navy guys that came there and they asked if I had some and where I found them, and I told them and they wanted to look at them.

Q. Where were they then?

A. They were in the junk pile there by the house, near the garage.

Q. Now, when you say it was shortly after this [149] accident—— A. Uh-huh.

Q. ——was it before you had talked to Mr. Coffey?

A. I don't believe I had. Let's see, I had heard about it, but I am not sure if I had talked to him or not.

Q. At the time the Navy people came to see

(Deposition of Floyd McKnight.)

you, you had no idea that the Coffey accident had been caused by these cylinders? A. No, no.

Q. Did the Navy boys tell you why they wanted to look at them?

A. No, they told me they was investigators, that is all they told me, and they insisted on taking them along with them, and I told them they wasn't in the way any and that I would just keep them.

Mr. Tugman: This is all hearsay, but I won't object, your Honor.

The Court: All right.

(Reading of deposition continued.)

Q. Tell us if you can, Mr. McKnight, how they found out you had these cylinders?

A. Well, I really don't know.

Q. Had you talked to anyone about it? [150]

A. No. No, I hadn't.

Q. Do many people come to your place, where you were living?

A. Oh, yes. Yes, they is lots of people there.

Q. This was while you were ditch riding?

A. Yes, it was.

Q. Was it with relation to the irrigation work that people would come to your place?

A. Yes, uh-huh. Yes, any complaint about water or anything, they would come in there, and then I had several guys working on a canal and all the time they was back and forth, and it was quite a public place.

Q. Were there any Navy personnel that came to

(Deposition of Floyd McKnight.)

your place, other than these men, prior to the time that these men came? A. Not that I knew of.

Q. Did the Navy men take any of the cylinders with them? A. No.

Q. Now, how long after that was it that you talked to Coffey?

A. I just don't remember offhand for sure.

Q. When did you talk to the Army people?

A. Just the exact date, I wouldn't know. [151]

Q. Well, now, what I mean, Mr. McKnight, is with relation to when you talked to the Navy people, when you buried them and when you talked to Mr. Coffey?

A. I would say about a week after these Navy guys was there, these Army guys came there, one colored lieutenant, and they also asked about them, and I think they had gone by and seen Coffey—I am not sure of that—but, anyway, I taken them out and showed them out and showed them what I had, and this here colored lieutenant, he did find these numbers on there and he said they was definitely Naval bombs, is what they were.

Mr. Tugman: I will object to that.

The Court: Yes, I think that should be stricken as hearsay, what the lieutenant said, that part of it.

(Reading of deposition continued.)

Q. Had the Navy personnel seen the numbers?

Mr. Tugman: I will object to that, too, and the answer to that question.

(Deposition of Floyd McKnight.)

The Court: Well, I think he can testify that he looked at the numbers and I will let that stand. Overrule the objection.

(Reading of deposition continued.) [152]

A. They didn't say anything about them. They looked at them, but they didn't say anything about them.

Q. Did you notice the numbers on this one cylinder at the time the Navy personnel were at your place?

A. No, I didn't even realize there was one on them until this lieutenant found this one.

Q. Do you know, Mr. McKnight, whether or not the Navy people saw the number?

A. I don't know. They looked at them. They first told me that they couldn't be theirs, they thought—they wasn't, rather, and I told them they definitely was theirs, I thought, or knew, rather, and they admitted they was, but it was an older type bomb than what they had prior to the present time.

Mr. Tugman: I will object to that statement.

The Court: Yes, I think that should be stricken as hearsay. It is conversation.

(Reading of deposition continued.)

Q. The Navy personnel, then, did say that these were bombs?

A. Yes, uh-huh, but they was an older type than they had at the present time. [153]

(Deposition of Floyd McKnight.)

Q. When was it that you first learned that they were bombs?

A. Just when I heard—when I went and talked to Coffey and found out—and he showed me that one and I knew that was explosive, but I didn't realize they was bombs until after this here lieutenant told me they was.

Mr. Loney: Your Honor, perhaps I am a little late in this, but I think the testimony will show later that the Naval personnel involved was headed by Commander Ridenour, and I think the statements he made as to the existence or identity of a certain object would be binding upon the government. I just wanted to point my feeling out to your Honor. Excuse me.

The Court: Well, I don't think there is much question but what this one that is in evidence constituted a type of bomb that was used in the Navy. At least, that is what the Sergeant testified, so this would be cumulative.

Mr. Loney: That's right.

Mr. Tugman: I would object to this testimony.

The Court: I have ruled in your favor on that. It is hearsay, it should be stricken out.

(Reading of deposition continued.)

Q. Perhaps I confused you with my question, Mr. McKnight. Didn't you tell me that you [154] talked to the Navy people before you learned of Mr. Coffey's accident?

A. I am pretty sure of that, yes.

(Deposition of Floyd McKnight.)

Q. Didn't you say that the Navy people told you this was a bomb? A. Yes, that's right.

Q. Then, didn't you know that it was a bomb before you talked to Mr. Coffey?

A. Yes, uh-huh. That's right.

Q. Were you not, then, somewhat apprehensive when you learned that they were bombs?

A. Yes.

Q. Did you do anything with them at that time?

A. Yes. I taken them up there, as I said, in the canyon up there and buried them.

Q. Then you buried them before you talked to Mr. Coffey, is that correct? A. Uh-huh, yes.

Q. You were mistaken before when you said it wasn't before you talked to Mr. Coffey?

A. Yes, uh-huh.

Q. Did you bury them before the Army personnel came or after the Army personnel came?

A. After. I don't know if it means anything or not, but these here Army boys, they insisted [155] on taking some of those along with them, and they took the two good ones that I had to clean them up and they said they would bring them back, but they never brought anything back. I let them take those two whole ones that I had along with them.

Q. The Army took the two whole ones?

A. That's right.

Q. Which ones did Mr. Coffey get?

A. Just some various pieces that I had left there, but they wasn't a whole one in the bunch.

(Deposition of Floyd McKnight.)

Q. Where did you get those pieces, Mr. McKnight?

A. At the same place I got those, just scattered around.

Q. I mean, were they in your junk pile when you gave them to Mr. Coffey, or did you have to get them where you had buried them?

A. No, I went back and got them where I had them buried. I went up there and dug them out.

Q. Mr. McKnight, you have signed a statement concerning this matter, have you not?

A. Yes, I did.

Q. If there are any discrepancies between the statement and what you have said here under [156] oath, what you have said here under oath is correct, is it not?

A. Yes, uh-huh.

Q. The statement you made prior hereto was not made under oath, was it?

A. No. No, it wasn't.

Q. How long have you known Mr. Coffey?

A. Just while I riding ditch there, just a short time.

Q. Were you riding ditch at the time that Mr. Coffey was hurt?

A. Yes, I was.

Q. Is he a good friend of yours?

A. No.

Q. Was he a good friend of yours?

A. No; nothing more than just one of the customers, that is all. Maybe I should have said one of the water users, which is all the same.

Q. Were you paid by him?

A. No.

Q. By whom were you paid?

(Deposition of Floyd McKnight.)

A. Sunnyside Irrigation District.

Q. Did these cylinders appear to have been handled by anyone?

A. No. No, just offhand I would have [157] thought they would just have been dropped right there.

Mr. Tugman: I am going to object to that. It is opinion evidence and I don't think he has been qualified as an expert to give an opinion on whether or not they had been dropped or handled.

The Court: I will strike that, the conclusion as to whether they were dropped.

(Reading of deposition continued.)

Q. Did they appear to have been carried there by anyone?

Mr. Tugman: I will object to that, too.

The Court: I will let that stand.

(Reading of deposition continued.)

A. Well, no, I wouldn't have thought so.

Q. If they had been carried there, somebody must have sat on them after they got there?

A. Yes. It more or less looked like that this little canyon had been their target. There is a short canyon there and those pieces, what I found on each side, was where they missed their target. That is what it just struck me after I found out they were explosive.

Mr. Tugman: I am going to object to that. [158]

(Deposition of Floyd McKnight.)

The Court: I think that should be stricken as a conclusion.

(Reading of deposition continued.)

Q. Did you ever go down into the canyon, Mr. McKnight?

A. No, it was impossible to walk through there, even get in there. There was so much undergrowth and grass, too rough.

Q. Was there anything to indicate that these cylinders might contain an explosive?

A. No, not right offhand.

Q. How old were your boys at the time you found these?

A. They was about eleven and thirteen.

Q. You most certainly would not have taken them home with your boys there if you had thought they contained explosives, would you?

A. No, I would not.

Mr. Tugman: I will object to the form of that question.

The Court: Well, it is a leading question. I don't know whether you reserved the right to object to the form of the questions. It is leading. I will sustain the objection. He has already answered the same thing.

(Reading of deposition continued.) [159]

Q. You would not have fooled with them at all, if you had thought they were explosive?

Mr. Tugman: Same objection.

(Deposition of Floyd McKnight.)

The Court: Well, I will sustain the objection to that and to the next question.

(Reading of deposition continued.)

Q. With relation to the place where you found these, where was the nearest house, farm house or building of any kind?

A. Well, there had been a rent house of Livengood's there, it was around a quarter of a mile.

Q. Was that the nearest improvement?

A. Yes, it was.

Q. Now, to set the record straight, you say the Wagner place and the Livengood place were next to each other? A. Yes.

Q. And where did Mr. Coffey live with relation to—— A. He lived about a mile north.

Q. Of which place?

A. Of the Wagner place and this Livengood place, too. The Wagner place and this Livengood place, they joined. [160]

Q. At the time you found these bombs, was Mr. Coffey living near there?

A. No. No, I don't believe he was. I don't believe he had moved there.

Q. Is there anything else that you could tell us about this, we haven't asked you?

A. I wouldn't know of anything that would be important. [161]

* * *

ELMER G. COFFEY

a plaintiff herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Loney:

Q. You are Mr. Elmer G. Coffey, one of the plaintiffs in this action? A. That is correct.

Q. Mr. Coffey, you have heard the testimony that Mr. McKnight just gave by deposition here. I am going to hand you the article that has been marked, or the [163] articles that have been marked as Identifications 11, 9, 10 and 2, and ask you to tell the Court where you got these.

A. These are the pieces that Mr. McKnight brought to me.

Q. And they were in your possession then until you gave them to me?

The Court: That is 2, also?

Mr. Loney: Yes, your Honor.

The Court: Yes, all right.

Mr. Loney: I offer these by way of illustration. They weren't the ones that caused any damage.

Mr. Tugman: Well, I will object to those on the basis that they have not been identified as to the area that they were found or located with any definity at all.

The Court: These are the same ones Mr. McKnight testified in the deposition he found on the Livengood place and then took over to Mr. Coffey, and Mr. Coffey has just testified that he got them

(Testimony of Elmer G. Coffey.)

from Mr. McKnight, so they have been identified as to where they came from.

Mr. Tugman: I will withdraw the objection, then, and qualify it to show that those are what Mr. McKnight found, if they are not admitted for the purpose of showing that they are Navy bombs or Army bombs or anything of that nature.

The Court: Well, they will just be admitted on the [164] basis of what they are and having been identified, and all the testimony will apply to them as to what they are, all the material testimony.

Mr. Tugman: Yes.

The Court: They will be admitted, then.

(Whereupon, the said objects were admitted in evidence as Plaintiff's Exhibits Nos. 2, 9, 10 and 11.)

Q. (By Mr. Loney): Are you familiar with the Livengood and Wagner places, Mr. Coffey?

A. Yes, I am.

Q. Have you observed on this map the area that your brother-in-law, Mr. Osborne, marked as indicating——

The Court: What were those numbers again, Mr. Granger?

The Clerk: 2, 9, 10 and 11.

The Court: All right.

Q. (By Mr. Loney): The area that is initialed here by Mr. Oliver Osborne as being the area in which he discovered the bomb, are you familiar with that area? A. Yes, I am.

(Testimony of Elmer G. Coffey.)

Q. Do you know who owns the property in that immediate vicinity? [165]

A. Well, the property to the right, facing north, would belong to Wagner, although he has recently sold. I don't know the name of the new owner. The property to the left, facing north, would belong to Livengood, who still resides there.

Q. You may resume the stand.

The Court: Let's see, I am not sure that I understood that testimony without having the map to look at. If you wish to come up here, Mr. Tugman, I just wanted to have the witness point out to me on the map here so I can follow the testimony a little better.

Let's see, this is upside down. Here is the Yakima River.

A. This is north in this direction (indicating).

The Court: Yes. I used to be a surveyor, I can do better if I look up north.

A. North comes this direction. This particular vicinity belongs to Mr. Wagner, or did at that time, and this belongs to Mr. Livengood (indicating).

The Court: I see, all right.

A. See, they adjoin.

The Court: Yes, all right.

Q. (By Mr. Loney): Mr. Coffey, I am now showing on the screen an article that has been marked as Identification 4—— [166]

The Bailiff: Would you like the lights out?

The Court: Yes, I think it would show up better. Pull down that shade.

(Testimony of Elmer G. Coffey.)

Q. (By Mr. Loney): Are you familiar with the area that is shown in that picture, which has been marked Identification 1? A. Yes, I am.

Q. Can you see the Yakima River in that picture? A. I can.

Q. And do you know the direction in which you are looking? A. South.

Q. Looking south. Did you accompany me when that picture was taken? A. I did.

Q. Do you know where we were standing at the time the picture was taken?

A. We were standing on the Livengood place, to the left side of the canyon.

The Court: What number is that?

Mr. Loney: 4, your Honor.

Q. Is that a fair representation of the draw that runs between the Livengood place and the Wagner place? A. Very fair.

Q. The foreground, that appears to be a light brown, is cheat grass? [167]

A. Probably the pasture Mr. McKnight referred to.

Q. Pasture. You will notice to the left of the picture—or to the right of the picture—what appears to be a shelter, a house, dwelling. Is that occupied?

A. That was not occupied. That is across the road.

The Court: Of course, that cut that shows there, is that the road? A. That is the road.

(Testimony of Elmer G. Coffey.)

The Court: You are pointing to the road now, aren't you?

Mr. Loney: Yes, sir, and the river is this location right here (indicating).

The Court: I see.

Mr. Loney: Now I will show what has been marked as Identification 3. Is that in focus, your Honor?

The Court: Yes, I can see that very well.

Q. (By Mr. Loney): Mr. Coffey, do you recognize that picture?

A. I believe I do. It is farther north than the other position, sort of around the bend. We are still looking south.

Q. Still looking south and we are still on the Livengood place?

A. Yes, sir, we are still on the Livengood place.

Q. Now I am pointing to a location in the far distance [168] over here. Do you know what that is?

A. That is the Yakima River.

The Court: Are those orchard trees up on the ridge there?

A. Yes.

Q. (By Mr. Loney): I will ask you first if that is a fair representation of that particular area?

A. It is, indeed.

Q. Do you recognize Identification 5, Mr. Coffey?

A. I believe that is the view looking north, and the road would probably be to the right and down below us. No, it is quite complicated, let me study it just a minute.

Yes, I believe that is correct.

(Testimony of Elmer G. Coffey.)

Q. Are you familiar with the portion right in here?

A. Yes, I'm sure that's right. That is the heavier cherry orchard that is back in there, and the light trees in front are apricots, much younger.

Q. And the picture was taken from the——

A. Almost from the highway, looking north.

Q. And would be from whose property?

A. On Livengood's again.

Q. And we are looking at the Wagner property to the right of the picture?

A. Wagner to the right, Livengood to the left.

Mr. Loney: Counsel, to save perhaps time, would you [169] like here to examine as to these pictures before I offer them?

Mr. Tugman: Frankly, I can't see the materiality of them. I can't see that they have been identified by anyone who can state that this is the area where those bombs were found, having found them there.

I see no objection to them, but I can't see that they are particularly material, just showing the Livengood ranch at random.

Mr. Loney: If your Honor please, I believe the testimony shows that they were found in the draw that separates the two farms and this is a picture of that draw.

The Court: The exact spot, perhaps, isn't shown, but the general area certainly is, according to the deposition testimony, I should think.

(Testimony of Elmer G. Coffey.)

Mr. Loney: We offer them only to show that general surrounding area, not to show——

The Court: Not to show the exact spot.

Mr. Loney: That is correct.

Mr. Tugman: With that reservation, I have no objection.

Q. (By Mr. Loney): You didn't find any of these objects yourself, did you, Mr. Coffey?

A. No.

Q. And you don't know of the exact [170] location? A. I don't have anything.

Mr. Loney: I guess that is all, we can turn on the lights.

The Clerk: Are they admitted?

The Court: If you are offering them, I think they should be admitted.

Mr. Loney: Yes.

The Clerk: 3, 4 and 5?

The Court: That's right.

(Whereupon, the said colored slides were admitted in evidence as Plaintiff's Exhibits Nos. 3, 4 and 5.)

Mr. Loney: Counsel, do you have any reason to want to refer to these pictures, or do you know yet?

Mr. Tugman: I can't think of any reason at all why I should refer to them.

Mr. Loney: I will return this equipment tonight, then, if I may.

Mr. Tugman: Yes.

The Court: All right.

(Testimony of Elmer G. Coffey.)

Q. (By Mr. Loney): Mr. Coffey, will you describe what occurred on the day that you sustained your accident?

A. Mr. Frederick came out to visit me. I had the sheep up [171] at the upper end of my place. He came up about—oh, about 11:30. We ran the sheep back into the corral and made our preparations to melt lead. He had obtained a regular lead melting pot and we cast quite a few bullets, .38's. He didn't know much about it and he wanted to learn. He had asked me some time before, a week or so before, if I would show him how I did it, because he was planning on buying the equipment and he had a gun to fire them in.

So we started casting bullets, I should judge, about 12 o'clock, about 12:10, perhaps. We ran low on lead and I decided that I would go down in the basement and get some more lead, and I thought perhaps if he wanted to try some higher velocity stuff, that I had this piece of lead had been laying there and I had scratched it before; in fact, I had examined it two or three times since they had brought it to me, and I realized it was composition lead, as the Sergeant pointed out, and it is harder than ordinary lead and would be very good to use for something that you wanted to put a gas check on and perhaps work up to about 2,400 feet.

Anyway, I went down in the basement and picked up the piece of lead and brought it out and I showed it to him and said, "Well, I guess we'll put this one in, [172] but it is dirty. If we put it in the pot

(Testimony of Elmer G. Coffey.)

now, that is something you must watch. If you put anything dirty into a lead pot, you will have a small explosion, it is liable to boil up into your face, so always clean your lead thoroughly before you put it in the pot."

I said, "Perhaps we can beat this off and clean off the outside and look it over." And I laid it down in front of me and beat it with a hammer, and the ends of the pieces were heavily encrusted with dirt and pebbles and sand, both ends. I thought perhaps they weren't packed in too tight, I probably could shake them out, so that was one of the reasons I beat it. The other was to beat the encrustation off the outside of it. I picked it up and shook it and certain parts of it fell off, all right, but the ends seemed to be stubborn, seemed to be packed quite solid, so I took this piece of iron pipe—I went over to the junk pile and picked up a piece of iron pipe and thought, well, I'll scratch it out with that or beat it out.

Being in a hurry, we wanted to get the thing done, seems like I'm always in a hurry, so I scratched the ends of it a little bit and scratched them loose. It was a little stubborn, wouldn't come out. Some came out, lots of dirt, and so on, but I saw that process was going to be so slow, so I looked at the thing and [173] reasoned, well, here is this lead cylinder and there is dirt in one point and there is lead around it. Naturally, there is a hole there and the diameter of the hole, and so on, looks to me like from both ends about the same, so it is reasonable

(Testimony of Elmer G. Coffey.)

to suppose the hole goes clear through. Okay, I will just punch it on out, so I got myself this pin and a hammer and I went to work on it. I punched it in, punched it in, and it must have went in about three inches. It was the fourth blow because I counted them. It helps whenever you hit with a hammer to count the blows. It does me, I always count whenever I hit with a hammer. I counted four blows that was it, it blew up.

I remember I had my thumb holding that rod over the end of it and it was in a position, perhaps, about like this to me (indicating). I was really swinging the hammer to it. And Mr. Frederick was on the other side, however, standing just about the same distance away from it as I was. The pot was making some noise. If it doesn't burn properly, it gives off a very loud noise and you adjust it and it burns quietly, so he reached down to adjust it about the time it went off. There was just a terrific jar on my hand. I supposed I had got myself into something some way or other. I didn't realize what fully happened. Of course, I [174] wouldn't.

Q. Then you were taken to the hospital?

A. The thing has been covered, I think.

Q. You were treated there by Dr. Armstrong?

A. Armstrong.

Q. You heard the testimony of your two brothers-in-law, Mr. Osborne and Mr. Osborne, and about them finding this object, and referring to the object that has been marked as Exhibit 1, does that

(Testimony of Elmer G. Coffey.)

appear to be either the object or something similar to it?

A. I believe that this is the object, as I could see—I can't see them as plain—they seem to be beaten all over. I imagine I turned it as I beat it, too, to shake it, get it off on all sides.

The answer to your question is, yes, I believe that to be the object.

Q. Was there anything about this object at that time that led you to believe it had any kind of an explosive or was dangerous in any way?

A. Absolutely nothing. It was simply an old, dirty hunk of lead.

Q. Had you been familiar with bombs or anything that remotely resembled that?

A. Absolutely not. I have never seen a bomb, I don't believe. [175]

* * *

Q. (By Mr. Loney): Mr. Coffey, you were visited by some personnel in the Naval organization?

A. That's right.

Q. After the accident?

A. After the accident.

Q. And, without telling what they said, what did they do when they came to your property?

A. Took the bomb.

Q. Did they request that you furnish it?

A. They asked for my permission for the bomb.

Q. You had, I believe, another one of these?

A. Yes, I did.

Q. Did you give that to them, also?

(Testimony of Elmer G. Coffey.)

A. No, my boy—I believe it was my boy—dropped that in the old fashioned toilet when he heard I was hurt. He came home and he went down in the basement, he felt pretty bad, he said, “This will never hurt anybody else,” so he dropped it in the toilet, old fashioned toilet.

Q. And this object, then, that is Exhibit 1——

A. Is the only one I have left. I mean, that is the disposal of the two.

Q. Had you seen any such objects, other than those two [187] objects, before the accident?

A. No, nothing—I have seen things that looked like those, yes, many—not many, but several.

Q. Before the accident?

A. Not bombs. Before the accident, yes. Nothing—I have seen objects similar to that, I might say. I will explain.

At Benton City they have a current-measuring device and there is an object looks exactly like that hanging on the end of a cord down to the river to measure the current. I guess that is what they are doing. I drive by there once in awhile and see that going up and down. It looks slack.

Q. Like a plumb bob?

A. Yes, that is it. I have seen large lead sinkers that look a great deal like that, over in Seattle, fishing sinkers. Too expensive now, they don't use them much any more. Some of the big fishing boats had heavy sinkers like that in general appearance.

Q. And were you aware of the names of these men who came out to see you?

(Testimony of Elnér G. Coffey.)

A. Yes; Porter, Call, and there was another gentleman that did what he is doing. I have forgotten his name, Reynolds, I believe, or something.

Q. Ridenour? [188]

A. Ridenour, that was probably it.

Q. After the accident then you discovered the true nature of these objects?

A. That is correct.

Mr. Loney: I have no further questions.

Cross-Examination

By Mr. Tugman: [189]

* * *

Q. Now, this other bomb you testified to, was it similar to the one here that is labeled Exhibit 1?

A. The bomb that was disposed of?

Q. Yes. A. It was similar to that one, yes.

Q. Longer, shorter?

A. About the same, I would say, there would be no difference.

Q. Same type of material?

A. Same thing exactly, I couldn't see any difference between the two of them.

Q. I see. Now, is this Exhibit 1 approximately the same shape now as when you first saw it?

A. Must be exactly the same shape. How could it change? I'm sorry.

Q. That is what I am asking.

A. I am supposed to answer the questions. I'm sorry, but it is exactly the same shape.

(Testimony of Elmer G. Coffey.)

Q. It is. Did you observe, when you first saw it, these [198] marks here (indicating)?

A. Well, when I first saw this, it had considerable dirt over each end of it. Very possible that I saw the marks on it, I don't know, I couldn't recollect that exactly.

Q. Do you recollect whether you saw these little holes right——

A. I couldn't answer that statement because these holes had all been covered with dirt. This thing was dirt flush with the surface.

Q. The dirt was flush with the surface?

A. Flush with the surface in both ends.

Q. I see. Now, you stated that you tried to dig the bomb out a little bit? A. That's right.

Q. How much digging did you do?

A. Just scratched it to see if the dirt would roll out of it fairly easy and it was too hard to get out that way, too slow.

Q. How much dirt did you get out of it?

A. Oh, third of a teaspoon.

Q. Third of a teaspoon. How much did you uncover, how much of the hole?

A. Just enough to see the edge there so you could come to the conclusion the hole ran right through it. [199]

Q. You could come to the conclusion the hole ran through it. Was there a hole at the other end of the bomb?

A. There was no hole, it was flush, but you could see where the color of the dirt and the color of the

(Testimony of Elmer G. Coffey.)

lead was different. If you would fill this with dirt, you could tell the hole ran clear through it.

Q. Now, which end did you run——

A. I can't positively guarantee that, but it would seem that—I would hold the heavy end like this, I do believe (indicating).

Q. So you probably ran it through the heavy end, is that right?

A. I probably ran it through the heavy end.

Q. And in your cleaning off, did you notice any other little metal objects that were appended here at all in the head of the bomb?

A. No metal objects at all.

Q. And you don't know whether or not you noticed any hollowed places there other than the hole, is that correct?

A. Well, the places like this, possibly (indicating). I can't say that I paid any particular attention to them, no. Why would—sorry.

Q. You heard the Sergeant testify, did you not?

A. I did. [200]

Q. You heard me ask him to put the pin from this bomb into Exhibit 1 there? A. Uh-huh.

Q. And, if you recall, he was able to insert this pin in there. I might ask you to look at that and see if you can find any place that that pin would go?

A. Yes, I saw him stick the pin in something like this, I imagine (indicating). There.

Q. Now, then, Mr. Coffey, did you see anything that resembled that? A. I did not.

Q. Did you see any holes where that pin might

(Testimony of Elmer G. Coffey.)

have gone. Did you see that particular position where that pin is fitting now?

A. That pin is below the surface of the bomb. I didn't see anything below the surface of the bomb because I didn't get in that far.

Q. Well, do you observe that those openings come out on to the side of the bomb?

A. No, they don't come out on this side of the bomb.

Q. Did they come out on one side of the bomb?

A. Well, the pin comes out on this side.

Q. Well, did you notice any holes there?

A. No. Wouldn't notice a hole that small if it was covered with dirt. [201]

Q. Did you notice any machined areas around that head of the bomb?

A. No machined areas.

Q. But you did clean off the head of the bomb there to some degree?

A. I scratched at it to see if the dirt and stuff was solid. It was too solid to get out scratching so I beat on it. That was my sole purpose in scratching on it.

Q. How much beating did you do?

A. I hit it four times good and hard.

Q. I mean before.

A. Before? I don't remember. I threw it down and beat it maybe for two or three minutes, just knocked the crust off the sides of it. It was covered with dirt, all over.

(Testimony of Elmer G. Coffey.)

Q. And you were able to knock quite a bit of the crust off?

A. I knocked off some and I saw that I was not getting anywhere because the dirt seemed to be fastened to the ends, rather than to the sides, so I concluded I would have to work on the ends.

Q. I see. Now, did the explosion of the bomb blow any pieces of the bomb off, do you know?

A. It couldn't have blown any pieces of the bomb off. [202]

Q. Well, did it? A. Did it, you say?

Q. Yes. I mean, was the bomb any longer before the explosion?

A. Before the explosion, was the bomb any different? It wasn't any different than this. No, I don't see it would be any different than this.

Q. Did you hear your brother-in-law testify, A. J. testify? A. Yes.

Q. Do you remember his testimony that the bomb might have been a little bit longer before the explosion?

A. I also heard him say that mortar shell was this long, too (indicating), and it isn't.

Q. That isn't what I asked you. Did you hear him say the bomb might have been a little longer before the explosion?

A. I heard him say that.

Q. Would you agree with that?

A. No, I wouldn't agree with it.

Q. Here, I will relieve you of that. It is a pretty heavy item.

(Testimony of Elmer G. Coffey.)

Did you see anything that looked like corrosion down in that hole?

A. Corrosion in the hole? [203]

Q. Yes.

A. I saw dirt in the hole. Dirt and corrosion are about the same sort of a proposition to me.

Q. I see.

A. Corrosion was probably what was on the outside of the bomb that I was trying to knock off, too, and it was dirt and corrosion. I mean the same thing when I say dirt.

Would it be possible for me to say a little more?

The Court: No, just wait until questions are asked. Your attorney will have redirect examination if you wish to make any explanation.

A. Oh, that's right. Asking him questions, I realize I shouldn't do that, that is impetuous. That is the trouble with me, I do things too quickly.

The Clerk: This will be Defendant's Exhibit 14 for identification.

The Court: 14?

The Clerk: 14.

The Court: All right.

Mr. Tugman: Mr. Loney says that might not be deactivated so we will handle it very carefully.

The Court: All right.

Q. (By Mr. Tugman): Showing you Defendant's Identification 14, do you recognize this [204] object? A. I do.

Q. Where does it come from?

A. That came from the bombing range. That is

(Testimony of Elmer G. Coffey.)

hearsay with me, I obtained it from a friend of mine.

Q. You got it from a friend of yours?

A. Yes, sir.

Q. I want you to observe this Defendant's 14. I will just keep it here so we won't be passing it back and forth. Do you observe anything around the head of the——

A. I observe the pin that you are speaking of now.

Q. Now, would you say that the appearance of this particular bomb looks pretty much like the bomb, Exhibit 1, prior to the time that you exploded it?

A. No, I wouldn't, I wouldn't say that at all. I would say it looks entirely different.

Q. Would you say there is quite a bit of foreign matter in there (indicating)?

A. There is foreign matter of some nature in there, yes.

Q. It is the same color as the other?

A. I wouldn't be able to answer that statement because this is the same color as the walls. I wouldn't know whether it was foreign or not.

Q. I see. Did you dig that hole that was approximately that deep in yours?

A. I did not. [205]

Q. How deep did you dig yours?

A. I didn't dig any kind of a hole, I simply scratched it. I scratched it to see if it would come out easily after that beating, and scratching

(Testimony of Elmer G. Coffey.)

wouldn't shake it out easily, there is no further use to dig any holes in it. You would have to beat it out, that was my theory.

Q. That was your theory.

The Court: I think that, perhaps, should be withdrawn now that we have seen it here. Because it is not deactivated, I don't want the Clerk handling it.

Mr. Tugman: Perhaps we could consign it to one of our demolition experts tomorrow to dispose of it properly.

The Court: Well, just don't leave it here.

Mr. Tugman: Yes.

Q. Now, you state that your hobby is guns and making bullets and that type of thing?

A. That is true.

Q. And in that respect, do you handle quite a bit of ammunition, quite a few bullets, and so on?

A. Yes, I have handled lots of ammunition.

Q. And in handling ammunition, what is your usual practice in regard to ammunition and bullets?

A. In what respect?

Q. Well, assume, Mr. Coffey, that you had a bullet you didn't know whether it was exploded or not exploded, [206] what would you do with it?

A. Put it in my collection.

Q. You would put it in your collection. Would you put a live bullet in your collection?

A. That is what the collection consists of.

Q. Would you put a live shell in your collection if you knew what the live shell was?

A. What do you mean by a shell?

(Testimony of Elmer G. Coffey.)

A. Well, this bomb here, if you knew the bomb was alive?

A. We were speaking of cartridges, not shells. I don't have any shells in my collection, just cartridges.

Q. If you had known that the Plaintiff's Exhibit No. 1 was live at the time you picked it up, would you have put it in your collection?

A. Certainly not. I would have no place in my collection, to begin with.

Q. I understand that you have another bomb at home, is that correct? A. That is not correct.

Q. Your brother-in-law testified that you had a bomb or a mortar shell or something at home.

A. I have had a mortar shell. It is down in the car now.

Q. Do you know that bomb or mortar shell has been deloused or deactivated? A. I do. [207]

Q. You do. You know that it has been?

A. I know nothing about mortar shells. I have been told by my son that brought that to me from Dutch Harbor that it was deactivated. It is possible to screw it all to pieces and look at all the inside of it. Therefore, I believe it is deactivated.

Q. But you don't know?

Q. And it isn't in my collection.

Q. Pardon? A. It isn't in my collection.

Q. Where do you keep it?

A. It sits on top of the bookcase.

Q. I see. But there is a possibility, is there not, that that bomb is still active?

(Testimony of Elmer G. Coffey.)

A. There is no possibility that it is still active, no. The cap in the end of it has not been exploded.

Q. The cap in the end has not been exploded?

A. That is true. That was pointed out to me by Lieutenant Jackson when he visited me.

Q. Now, have you made any effort to decontaminate that cap? A. I certainly have not.

Q. Why haven't you?

A. Because I don't consider it dangerous and, furthermore, I wouldn't know how to do it. [208]

Q. How much experience have you had in fire-arms, Mr. Coffey? A. What is it?

Q. How much experience have you had with fire-arms? A. I have handled them all my life.

Q. And you don't consider a cap of that nature dangerous at all?

A. A cap in a shotgun shell, would you—I am supposed to answer your question. No, I don't, of that type, from what I know of them. I don't know anything about that cap. That is one reason I didn't try to do anything with it. I wouldn't know whether that cap is dangerous or not, but a cap of that size in a cartridge wouldn't be particularly dangerous.

Q. Now, when you were scratching the hole in that bomb, did you use your finger nail in trying to get that stuff out? A. Finger?

Q. Yes, your finger.

A. I don't believe so, I couldn't recollect that.

Q. Are you sure you didn't use your finger first and then try and scrape some out?

(Testimony of Elmer G. Coffey.)

A. I had gloves on at the time, I doubt very much if I used my finger in any operation.

Q. I see. Do you remember talking to Commander Call sometime [209] just after the accident?

A. I talked to him, I remember talking to him, yes.

Q. Do you remember telling him that you first used your finger and then an iron bar to try and pry some of the material out of the hole?

A. Could be, and it is possible that I might have done so.

Q. I see. And do you still say that you weren't successful in getting any of that material out?

A. I didn't get any material to speak of out of it.

Q. You got about a third of a—

A. Third of a teaspoonful, perhaps, as I recollect. That is a long time ago and it is hard to figure that out. Not enough to be satisfactory, I should put it that way.

Q. Mr. Coffey, you must have read some of the advertisements and articles in the papers and heard over the radio communications advising people of bombing areas around there?

A. I not only didn't read any of that prior to the accident, I haven't been able to find one since the accident.

Q. Ever listen to the radio?

A. Not very often, I am too busy.

Q. You have never heard of any such items at all? [210]

A. I have been told they have been on the radio.

(Testimony of Elmer G. Coffey.)

Friends of mine have asked me once or twice if I heard a radio broadcast about something shortly after they had learned I had hurt my hand with the bomb, but I, personally, have never heard or read in any paper anything relating to bombs. Except pictures, that I have seen pictures of bombs, but you are speaking of warnings to civilians, aren't you?

Q. Yes.

A. I have not heard or read at any time any warnings to civilians on the bombs other than what went with one of these discoveries that it notes in the paper.

Q. Now, surely, you knew of the existence of the local bombing range near Pasco, did you not?

A. How would I know of the existence of a bombing range? I am asking questions again, I'm sorry. I did not, no, the answer is no.

Q. You seem to have gotten an awful lot of information about this bombing range since your accident, is that correct?

The Court: That is argumentative. Sustain the objection to that.

Mr. Loney: If you mean did he write his congressman—— [211]

Mr. Tugman: I have no further questions.

The Court: Any redirect examination?

Mr. Loney: Well, no, I think not at this time, your Honor, anyhow.

The Court: I think it is time to suspend now, then. Court will adjourn until 10 o'clock tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., March 1, 1955.) [212]

Walla Walla, Washington—March 1, 1955

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to wit.)

The Court: All right, proceed.

Mr. Loney: When we finished last evening, your Honor, Mr. Coffey was on the stand. I didn't examine on redirect, but I don't think there is anything further that we need bring out. Therefore, I rest.

The Court: All right.

Mr. Tugman: You rest, counsel?

Mr. Loney: Yes.

(Plaintiffs Rest.)

Mr. Tugman: At this time, the government moves to renew its objections to the introduction of certain material in this case on the ground there has been no basis laid for the introduction of any of the testimony concerning other bombs or fragments of bombs purportedly found in the vicinity of Benton City. There has been no showing that any examination has been made of these items to show their actual [214] nature. There has been no showing as to their origin and there has been no showing as to any identity of the location from which they came

with any certainty at all. And on the basis that there has been no connecting evidence whatsoever to show how those bombs got there, if they are bombs; on the basis that their location when they were found has not been established, we renew our objections and move that all the evidence in that respect be stricken.

The Court: The motion will be denied.

Are you ready to proceed, Mr. Tugman?

Mr. Tugman: Yes, I am.

The Court: All right.

Motion to Dismiss

Mr. Tugman: At this time, if the Court please, the government moves again to dismiss the plaintiffs' case on the basis that the plaintiff has not sustained his cause of action as stated in the complaint. It is the contention of the government herein that for the government to be liable, according to the terms of the complaint, the plaintiff must sustain the burden of proof, which we feel he has not met, of showing that the United States Government, through the Department of the Navy, or through at that time the then United States Navy, negligently dropped a 13-pound practice bomb on a certain ranch and caused the injury to the plaintiff.

Now, we submit that this is not a case where *res [215] ipsa loquitur* applies. I think it is alleged in plaintiffs' complaint that *res ipsa loquitur* does apply. In that respect, I cite the case of *Clark vs. the City of Bremerton*, which is 97 Pacific (2d), 112.

I do not have the Washington citation. It is a Washington case where the court states:

“Where an injury is the result of a way in which an instrumentality was used, and the injured party is himself the actor, the doctrine of *res ipsa loquitur* is inapplicable.”

Now, in this case the plaintiff has brought in his own testimony that the plaintiff Coffey by his own actions detonated this bomb. There could be no dispute about that.

Under the rule of the Clark case, and I think under the well settled construction of the rules of *res ipsa loquitur* under a situation of this nature where the plaintiff is himself the cause of the injury to himself, or some act of the plaintiff is responsible or in some way a part of that injury, the doctrine of *res ipsa loquitur* does not apply. That doctrine assumes that the instrumentality was in the exclusive control and possession of the defendant. That situation, patently, is not present here.

If, then, the doctrine of *res ipsa loquitur* is ruled out in a case of this kind, then it becomes [216] necessary, by the theory of the government in this case, that the plaintiff must show plain negligence. To show that negligence on the part of the government, we contend that it is necessary that the plaintiff establish that the United States Navy did, in fact——

The Court: You needn't spend any time on that. I will concede that they haven't shown directly any negligence; they haven't proved that Pilot X got

out of the area and dropped a bomb. It would only be by *res ipsa loquitur* that they could establish their case, so you needn't dwell on the question of direct negligence. There hasn't been any proof of it.

Mr. Tugman: That is true.

The Court: Yes, all right. So we don't want to take up any more time than we have.

Mr. Tugman: It is our contention, your Honor—I am citing just that one case——

The Court: I might say this, Mr. Tugman, while I don't want to unduly restrict you here, it is a settled policy in the Federal Courts that where there is any doubt about it at all, particularly in a case before the court, it is preferable to get all the testimony in and then argue the legal points after it is all in. And if you argue now exhaustively your legal points, and if I deny the motion, you are going to have exactly the same points and the same [217] argument to make again this afternoon when you finish. I hope you finish this afternoon.

Mr. Tugman: Yes, your Honor.

The Court: And I prefer to have you make a record. Your witnesses are here sitting around, why not have them testify? Then we will hear your argument and the Court will decide it.

Mr. Tugman: Yes, your Honor.

The Court: I think there is enough, at least reasonable doubt in the Court's mind here, that I should have all the testimony. And the Court of Appeals prefers it that way, because if I decide it now and they say, "Well, you have got too much ahead here. We would rather have this on all the

record and all the testimony." They have said that in a number of cases.

Mr. Tugman: Yes, your Honor.

The Court: Where the Court decides the case when the case is only half in.

Mr. Tugman: I think your suggestion is well taken. I don't want to argue it twice.

The Court: I think I get your point, I think there is an issue on *res ipsa loquitur* here.

Mr. Tugman: Yes.

The Court: But I prefer to have your testimony and then we will argue. [218]

Ruling on Motion to Dismiss

With that thought in mind, reserving your right to renew the motions at the close of all the evidence, the Court will deny them now.

Mr. Tugman: That is true. Thank you, your Honor. Mr. Dickey.

J. B. DICKEY

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

By Mr. Tugman:

Q. Your name is J. B. Dickey?

A. That is correct.

Q. And your rank is what?

A. Chief Warrant Officer, U. S. Navy, at this time.

Q. Beg your pardon?

(Testimony of J. B. Dickey.)

A. I have to clarify that slightly. At this time, I am acting in the capacity as the 13th Naval District Explosive Ordnance Disposal Officer for the United States Navy.

Q. Where are you stationed, Mr. Dickey?

A. At the Naval Ammunition Depot, Bangor, Washington.

Q. What are the duties of your particular job?

A. To dispose of or to inert any dangerous objects or munitions of any explosive or a chemical or of like [219] nature, pyrotechnics, and so on, in a manner that will prevent injury to enlisted, or you might go as far as to say any person.

Q. Civilian or military?

A. Civilian or otherwise.

Q. What training have you had, Mr. Dickey, in ordnance matters, bombs and other explosive materials, as used by the Navy?

A. I have been in the U. S. Navy since 1938, and in connection with that, I have been around ammunition, had control of it, and you might say fired it, preserved it, and inventoried it, and so on.

Q. Have you had any specific training in matters of ordnance? Have you gone to any schools?

A. Yes, I have attended several courses of instruction. In 1938, I attended a class, an ordnance school, which covered all types of ordnance equipment and also included fire control and electrician's mate, and I attended a course of instruction at the U. S. Naval Gun Factory, which covered all types of modern weapons and equipment and fire control

(Testimony of J. B. Dickey.)

used therein, and I also have attended the Explosive Ordnance Disposal School located at the U. S. Naval Powder Factory, Indian Head, Maryland. And I have also attended the Special Weapons Disposal School located at Indian Head, Maryland. [220]

Q. Now, in your capacity as a disposal officer, have you had occasion to decontaminate, if I am using the proper word, quite a lot of ordnance?

A. Quite extensively, yes. I was located on Okinawa shortly after the second world war and we did disposal work quite extensively in cleaning up the island, and so on. This, however, was before my course of instruction at Indian Head, Maryland. However, I was acting in the capacity of a gunner at that time, I was a warrant officer, as I am now, and we were called upon—I was located at the Naval Ammunition Depot on Okinawa—and we were called upon to dispose of and collect quite a large amount of ammunition, and some of that ammunition was in a fused and serviceable condition, had been previously fired, and so on.

Q. Since your course of training at Indian Head, have you had occasion to pursue this work further?

A. As I previously mentioned, I have been since 1950 in explosive ordnance disposal work, and I have had occasion to decontaminate, as you mentioned before, quite a few items of explosive ordnance.

Q. I might ask you, Mr. Dickey, what is the proper word? Should I say “decontaminate,” or what should I say?

(Testimony of J. B. Dickey.)

A. Well, that is as good a word as any.

Q. Are you familiar with the type of ordnance used in the [221] Naval and Army Air Service?

A. I am. In addition to my being the 13th Naval District Explosive Ordnance Disposal Officer, I am connected with the Naval Ammunition Depot located at N.A.D., Bangor, and, in addition to that, I am the Magazine Stowage and also the Magazine Gunner located at N.A.D., Bangor.

Q. Showing you Plaintiff's Exhibit 1, have you seen this object before?

A. Yes, I have.

Q. Would you please tell us what it is?

A. It is a 13-pound Mark-19 A & N practice bomb.

Q. What do you mean by that terminology?

The Court: Is that No. 1 that you have there?

Mr. Tugman: Yes, your Honor.

A. That is a piece of equipment used by both the Army and Navy for practice drops from high altitude. High speed drops from a high altitude only.

Q. What are the characteristics of this particular bomb?

A. Would you clarify that?

Q. Well, let me go back a minute. You said this bomb is used in dropping at high altitude. Would you please explain what you mean?

A. It is to be dropped from horizontal aircraft at 6,000 feet or above, and it is to be used against light [222] armored vehicles or can be water drops or it can be dropped on land.

Q. I see. Is it used in other types of drops, that

(Testimony of J. B. Dickey.)

is, dive bombing or skip bombing, that type of bombing?

A. No, it cannot be, due to the fact that it would be, as in this case, it would be a dud, is what we call a dud.

I will clarify that, meaning that it still has explosive contained therein. It would not detonate, due to the fact that the force of impact would be in a side motion and would not shear the shoulders in the piece of equipment. Therefore, the detonator holder would not reach the primer cap.

Q. In other words, for this bomb to explode, it must hit upon its nose, is that correct?

A. It must hit upon its nose or receive a force of motion upon the base of the primer cap, which is a Winchester primer cap, that is, in normal operation. However, it has been brought out that a force of motion applied by a blunt instrument against the detonator holder or the use of, you might say, a nail or rod, steel rod or anything, against the primer cap, will detonate it.

Q. Is there any limitation on the speed in which this bomb can be carried in an aircraft?

A. The speed should be approximately 250 [223] knots.

Q. In terms——

A. A knot being a mile and one-eighth.

Q. A mile and an eighth? A. Yes.

Q. In other words, about 300 miles an hour?

A. That is about correct, yes.

Q. What speed, Mr. Dickey——

(Testimony of J. B. Dickey.)

Mr. Loney: Excuse me just a moment.

I wonder if this line of testimony is material, your Honor, as to the speed it should be carried at? I don't quite see its materiality.

The Court: I don't see the materiality of it.

Mr. Tugman: If the Court please, I am trying to show that the practice ranges in the Richland area, or I will show the practice ranges in that area were used entirely and exclusively for dive bombing and for skip bombing purposes. There was no high altitude bombing in that area, and I am trying to show that this particular bomb was not carried in planes flying 6,000 feet level flight, of which there were none operating in that particular area.

The Court: All right.

Mr. Loney: If this witness is qualified to answer those questions, your Honor, but I don't think—well, I will object to the question.

Mr. Tugman: I will qualify him a bit further, then, [224] counsel.

Q. Mr. Dickey, the information concerning this 13 pound practice bomb, where do you find information on that?

A. We have several sources of information. The best and most accurate information is furnished by the Bureau of Ordnance in a bomb aircraft pamphlet. In other words, a pamphlet we call an ordnance publication 1280 gives all the correct information, the weights and the type of equipment it is used against, and the types and the formation, manufacture, specifications, and so on.

(Testimony of J. B. Dickey.)

Mr. Tugman: If the Court please, I would like to have this item placed in evidence. Now, it is a confidential Navy publication and I don't want to mark it if I can help it. It is a little bit difficult to——

The Court: Well, I don't know. Is that classified material?

A. Yes, it is classified material.

The Court: Well, if it is classified material, you can't admit it in evidence. You might have the witness testify as to that part of its contents which you wish to disclose and then, if it is necessary, if it is questioned, why, the Court can in chambers examine the document with counsel.

Mr. Tugman: Yes, your Honor. [225]

The Court: That is sometimes done.

Mr. Loney: Your Honor, if you would like, I am not waiving my objection to its materiality, but if counsel is allowed to introduce it, it could be the pertinent portion could be read right into the record.

The Court: Well, that, unless—are there parts of it that can be disclosed without violation of the classified restriction?

A. I believe that would be satisfactory. I see no reason why the small portion in connection with this——

Mr. Tugman: Pertaining to the 13 pound practice bomb could not be disclosed?

A. That's right.

(Testimony of J. B. Dickey.)

Mr. Tugman: I wonder, then, your Honor, if we could just have the witness read this portion? It is a very small portion.

The Court: Yes, with counsel reserving the right to make any objection to it other than its authenticity. Is that acceptable, counsel?

Mr. Loney: Yes, your Honor. I would like to object on the basis that it is hearsay testimony. I don't thing it is proper that anyone introduce a book.

The Court: What is this book, Officer?

A. It is the manual that we use for information on our bombs and aircraft bombs, and so on. [226]

The Court: It is an official Navy publication?

Mr. Tugman: I would expect to qualify the publication, your Honor.

The Court: Well, all right, he may read from it, then, the record will show the objection.

Mr. Loney: All right, your Honor.

Excuse me just a minute. Do I understand this is not a Navy rule or regulation of any kind, it is merely information that the Navy publishes, is that right?

A. It is published for the uses of the services, yes.

The Court: As technical information?

A. As technical information.

The Court: Yes.

A. Yes.

Q. (By Mr. Tugman): And this book is an official Navy publication? A. Yes.

(Testimony of J. B. Dickey.)

Q. I wonder if you would please read the portions of that book concerning the 13 pound miniature bomb, Mark-19 Mod.?

A. Which would you like for me to read? Right here?

Q. Yes, right there, if you would.

A. (Reading): "The use of this bomb is for use in high altitude, horizontal bomb practice, and may [227] be used against armored-deck target boats having 20 pound S.T.S. half-inch armor deck, provided the altitude at release does not exceed 6,000 feet horizontal altitude after release."

Q. Now, Mr. Dickey, is there anything in that publication which concerns the speed that that bomb can be carried on an aircraft? A. Yes.

Q. Would you please read that portion?

A. (Reading): "The maximum speed of release at dive bombing attacks against these targets and boats must not be exceeded in 200——"

I have digressed here, this is the small 4.5 miniature. I don't believe that it mentions in here other than one bomb is carried in the Mark-46—or Mark-461. Therefore, it doesn't mention the speed in connection with the 13 pound bomb.

Q. I see. Now, Mr. Dickey, what are the characteristics of this 13 pound practice bomb? How is it made up and what are its components?

A. Well, it is made up of zinc-alloy composition and it has a fixed—the vanes, the tail vanes are fixed, you might say, a sheet tin or sheet steel material, and [228] it contains a detonator holder and

(Testimony of J. B. Dickey.)

an A & N, what we call an A & N Mark-4, as I clarified before, Army-Navy Mark-4 cartridge contained within the body.

Q. Perhaps you can testify and identify these exhibits here as you go along as to the components here.

A. Yes.

Q. Handing you Defendant's Exhibits 12-C, 12-A and 12—

A. This is the Mark-19 practice bomb and is made of an alloy composition, zinc-alloy composition, and, as a matter of fact, I drew this bomb from the Naval Ammunition Depot's stock to show what a complete round would be. This is a detonator holder (indicating) and it contains the detonator in the small projection here, which upon release and striking the ground, strikes against the primer cap contained in the A & N Mark-4 signal.

Q. What material is that detonator cap made out of, Mr. Dickey?

A. It is made of the same material, an alloy composition, very soft alloy composition, as is the bomb itself.

Q. As is the bomb?

A. Yes. This is the retainer pin and is taped in upon shipment, and so on, and upon assembly the pin itself is inserted to the Mark-4, is inserted in the inside here and rests upon shoulders contained about two inches [229] down within the recess here and it is inserted in the nose end. The detonator

(Testimony of J. B. Dickey.)

holder and you might call it a carrier, too, is inserted in the practice bomb, the retaining pin is inserted and then is peined over on the sides here to contain the pin so it will not come out. That is an assembly for dropping.

Q. Now, how is the bomb detonated?

A. The bomb is detonated upon impact.

Q. Concussion?

A. Concussion, correct. As in the case of a more familiar object, upon firing a cap from, in this case, a shotgun, the similarity is that it is a shotgun shell and it has the same type of primer, percussion-type primer, as a shotgun shell.

Q. Now, how much force does it take to set off one of these?

A. Quite a force when applied in the dropping of it.

Q. Is this type—pardon me.

A. I will go a little further. The dropping action takes place due to the projectile, you might call it, the practice bomb, which, striking the ground, tends to drive the detonator holder up, and the force of motion being applied in a downward position, causes the cartridge to come down and meet the detonator holder and shears the shoulders contained within the small bomb [230] and it strikes the base of the primer.

The Court: It is the momentum of the cartridge when the thing stops?

A. It is the momentum.

The Court: Carries it on?

A. Carries it on.

(Testimony of J. B. Dickey.)

The Court: The reverse of the gun when the pin goes; in this case, the cartridge comes down?

A. Correct, sir. The purpose of this is to create a signal for spotting. In other words, the mixture contained within this A & N Mark-4 cartridge is a pyrotechnic composition on top of a black powder composition and is ignited by a percussion, a Winchester percussion cap, and it creates a spot so that it can be observed and photographed from the air to observe your effect of target practice by bombing.

Q. (By Mr. Tugman): Now, is this bomb liable to go off on casual handling; that is, if it were dropped from an elevation of three, four, five feet, if it liable to go off?

A. No, but using a normal precaution, that is, normal care, and so on, in the handling of this, it can be loaded and it can be treated the same as a shotgun shell or anything of that nature. By observing normal care, the projectiles can be loaded and then inserted for flight [231] in an aircraft and what not and they are perfectly safe, perfectly safe meaning the cautious handling of any piece of loaded equipment. Just like a loaded revolver, you handle a loaded revolver very carefully.

Q. In other words, it takes an external force administered to the bomb to set it off, is that correct?

A. That is correct. Either through some use of some exterior means by pounding with an object or either by the normal procedure of this bomb being dropped out of an aircraft.

(Testimony of J. B. Dickey.)

Q. Now, Mr. Dickey, in the course of your work, have you had occasion to go on any bombing ranges and that type of thing?

A. No, not so much on bomb ranges. The joint responsibility covered in the explosive ordnance disposal operations governs this in the fact that I am the Disposal Officer for the 13th Naval District, and the area of my responsibility is that I will take care of all explosive items up to and including the high water mark of the ocean areas, the lakes and rivers governed within the different Naval Districts. In this the 13th Naval District covers Washington, Oregon and Idaho, and any objects found within these localities, the Navy Department will take care of, and this includes also the Naval establishments. In the case of explosive ordnance disposal responsibilities, the area of responsibility, as you say, these bombing ranges, and so on, if they were within the Naval control would be cleaned and taken care of by Navy personnel. However, the explosive ordnance disposal is taken care of by the Army or the Air Force. They are responsible for zones, you might classify them, for the disposal of all items found on land and within private dwellings, and so on, of that nature, and also to include the former bombing ranges, and so on, held by the Navy and then returned to private ownership.

Q. I see.

Mr. Tugman: You may examine.

The Court: Is this the same type of practice bomb that is used by the Air Corps, do you know?

(Testimony of J. B. Dickey.)

A. Yes, this is the same type.

The Court: I don't know since the reorganization whether the Army still operates planes and does practice bombing.

A. That is correct. I might——

The Court: The Army uses it, too, then?

A. Yes.

The Court: I see. Well, that is all I have in mind. Mr. Loney, you may go ahead. [233]

Cross-Examination

By Mr. Loney:

Q. Mr. Dickey, in connection with the last statement that you just made, actually, under your division of responsibility, the cleaning up of ordnance in the area around Mr. Coffey's residence and around the Tri-City area is the function of the Army disposal group?

A. That is correct, unless the property is still within the control of the Naval Service, and then we will be called in to take care of it.

Q. And, in other words, as between you and Sergeant McCammon, who is here today, his responsibility is to clean up that area and yours is to handle anything dropped at sea or up to the high water mark, is that right, in the State of Washington?

A. That is correct. Also, Naval stations and Naval air stations, and so on, held by the Navy.

Q. Such as Sandpoint Naval Station?

(Testimony of J. B. Dickey.)

A. That's right. However, as I stated before, this zone of responsibility only came into effect about 1951. Before that time, the Navy was called in quite often to take care of the disposal of items that were found.

Q. I suppose you, yourself, have never been called in on this particular range that is in question?

A. No. I have never been called in on the Benton County [234] ranges.

Q. You had a map that you furnished to Mr. Tugman which we used. Is this classified information? Can it be——

Mr. Tugman: Counsel, Captain Smith furnished that map.

Mr. Loney: Oh, excuse me.

A. Yes.

Mr. Tugman: I believe.

Mr. Loney: It is your own personal map, Captain?

Captain Smith: Well, no, I borrowed it from the airport manager.

A. Oh, yes, it wouldn't be classified, then, I don't believe.

Captain Smith: No, sir.

Q. (By Mr. Loney): I am wondering if you would mind, Mr. Dickey, in stepping down here to this map? Perhaps it could be done at a recess. Let's do it that way and save time. Excuse me for bringing you down here. We can do it at recess.

A. All right.

(Testimony of J. B. Dickey.)

The Court: I was going to suggest that if you want to use the document in evidence here, it can be returned after the case is concluded.

Mr. Loney: Would that be satisfactory, Captain Smith?

Captain Smith: What is that? [235]

Mr. Loney: If we introduce this in evidence and then return it to you as soon as the case is concluded?

Captain Smith: Yes.

Mr. Loney: Fine.

The Court: What I mean by concluded, the time for appeal expires or the appeal has been decided in the Court of Appeals.

Mr. Loney: All right, sir.

The Court: It doesn't mean when we get through here.

The Clerk: Plaintiff's Exhibit 15 for identification.

Q. (By Mr. Loney): Is there any portion of that book that I can look at without being out of line?

The Court: I think he said it wasn't classified.

Mr. Loney: No, the book, your Honor.

A. No. The book is classified, yes.

The Court: I thought you were still talking about the map.

Q. (By Mr. Loney): Is there any portion of it relating to those—I believe there are about four types of practice bombs, the four pound, six pound, 13 pound and 100 pound?

(Testimony of J. B. Dickey.)

A. Yes, that is correct.

Q. Am I right? A. Yes.

Q. The information in your book relating to those objects, [236] is that classified?

A. Yes, it would be classified.

Q. And it wouldn't be permissible, then, for me to see the material on the four pound and the six pound practice bomb?

A. Well, it is not for general publication to the public as a whole. It is of a restricted nature for the use of the Armed Forces only, you might say.

Q. Well, I presume that I shouldn't look at it, then.

Mr. Tugman: Mr. Dickey, would that be of any different nature than the 13 pound bomb?

A. I don't think so, too much.

Mr. Tugman: Counsel apparently wants to look at that, I would have no objection. I can't say whether it is restricted or not.

The Court: Well, I suppose the Navy is the same as the Army, there are different grades of classification?

A. Yes.

The Court: And this is a low-grade classification, I think.

A. Yes.

The Court: It would be proper for counsel to see it so long as it isn't given out for publication? There is no reporter here.

A. That is satisfactory with me. [237]

(Testimony of J. B. Dickey.)

The Court: It wouldn't be given general publicity.

Mr. Loney: You just pick it out for me and I will look at it afterwards.

A. Yes. You were interested in this (indicating)?

Q. Yes. A. This one here?

Q. That is a four pound bomb?

A. Uh-huh, four pound, and then it goes to 13 pound, and so on.

Q. Are they all loaded with shotgun shells?

A. Yes, they are, they are all of the same type.

Q. And are they all made of a lead compound?

A. No, they are not, there is several different types. I am surprised at the fact that there hasn't been several different types submitted here, because previous to World War II we had aluminum practice bombs of a smaller nature, say the three and four pound, we had those, and later on during the war this was a sort of a strategic material, this material here, and they used a steel or an iron composition, small practice bomb. However, the openings, and so on, the type of cartridges and everything, were the same, similar nature. They might have been a little different due to the modifications of it, say the difference in pyrotechnical material, and so on, would change the marks and mods. [238]

Q. You were reading something about speed in there. What bomb did that relate to?

A. This one here (indicating) I was reading about was the two pound. I believe you was inter-

(Testimony of J. B. Dickey.)

ested in bombing target boats having 20 pound, the maximum release elevation was 2,500 feet.

Q. Well, now——

A. Or not dive bombing in excess of 290 knots.

Q. Correct me if I am wrong, but isn't this the circumstance as to that material that you were reading from the book, that is for information in telling you how you can handle those type of bombs against a certain type of target, for instance, a ship that is armored with a certain thickness of steel, and, therefore, the provision that it must not be dropped over 6,000 feet relates to the penetrating force that it might have when it struck that ship?

A. Yes. Due to the fact of the construction of this type of equipment, as I showed you before, it has a lead shoulder on there for shearing purposes. This is a safety factor, you might call it, so that if the bomb is dropped on an armored deck or steel deck or dropped on concrete or anything, it will not go off. There is a remote possibility that it will go off; however, the chances are very small. The bomb itself, I would like [239] to bring out the fact that upon receiving this information I was sort of curious and it is one of my duties to find out if certain things will take place, then I am forewarned and, as such, I am forearmed in the fact of handling these pieces of equipment.

I took a bomb of a like construction with the Mark-4 A & N signal and I proceeded to throw it against a concrete walkway of about a four-inch construction from a second-story platform and I

(Testimony of J. B. Dickey.)

threw it down at an angle, and I'm sorry I didn't bring the bomb, I could have shown you what happened to it. It tore the tail, the tail came off of it, and it dented the nose in here in a like manner as in Exhibit 1 there, and it did not fire.

Q. In other words, Mr. Dickey, if these objects were used and were dropped at an angle like this (indicating), the thing that you would expect to happen from your experiment is that the tail would drop off, break off?

A. That is correct.

Q. And that the object would not fire?

A. That is correct. It could very easily still be a dud. So if we found it in that condition, we would be sort of suspicious of the fact it was loaded.

Q. Well, you heard the testimony of Sergeant McCammon and you have no reason to think that his testimony is [240] incorrect to the fact that he has picked up quite a few of these objects or seen quite a few of them on the range out there?

A. Yes, I have no doubt, I know there is quite a few scattered around out there.

Q. Then, it is very possible, isn't it, Mr. Dickey—

Mr. Tugman: I would like to clarify that. I think he said he picked them up on the range itself, is that correct? Is that where you were, on the bombing range?

Mr. Loney: Yes, and around it. I believe he drew a circle on the map to indicate the areas that he had found them.

A. Yes, I heard his statement, the fact that he did.

(Testimony of J. B. Dickey.)

Q. Then, it is very possible, isn't it, Mr. Dickey, that the Armed Forces of the government in using this bomb were using it the wrong way?

Mr. Tugman: I am going to object to that.

A. I couldn't say.

Mr. Tugman: Your Honor, I don't think the witness is qualified to answer that question as to whether they were using it the wrong way or not.

The Court: Well, he is an expert witness. You had him testify as such.

Mr. Tugman: I see.

The Court: I will overrule the objection. [241]

A. I don't believe that I could state the fact that it was dropped or it was not dropped, either, because I was not in this locality. And I know that the commanding officers of Naval ammunition depots, upon receipt of a letter from the commanding officer of any activity, will furnish them ammunition of his letter, providing it falls within the category that is governed by his allowance list. And there is times that the commanding officer has a special project to be carried out by being this nature, that is, a classified project for test of some equipment or something like that, he might draw something that he is not authorized to, but, however, he will have to have a letter authorizing him to do this.

The Court: I assume that you don't know, Mr. Dickey?

A. No, I don't know the procedure of that and I shouldn't bring that out.

(Testimony of J. B. Dickey.)

The Court: Well, what I started to say is you don't know of personal knowledge how the range was used near Richland, the Naval range?

A. No. However, from my predecessor, Lt. Commander Ridenour, I had a report, which is only hearsay and I don't believe should be submitted.

The Court: Let's not have it, then.

A. That it was—— [242]

The Court: Let's not have it.

A. ——that is, for practice range only.

Mr. Loney: I have no objection.

The Court: I will strike that as hearsay. Go ahead.

Mr. Loney: I have no objection, your Honor, if he testified to that, unless counsel has an objection to it.

Q. Lt. Commander Ridenour was the man who investigated this particular accident and went to Mr. Coffey's farm and talked to him and received this practice bomb, is that right?

A. Yes, that is correct.

Q. Well, now, let me ask you this question, Mr. Dickey: If the Naval forces or the Army had been using this range as a dive bombing range or a skip bombing range, and if they had been using this type of practice bomb, they would have been using it improperly, wouldn't they?

A. I believe so, yes. Therefore, you would find quite a large quantity of duds and you would find a lot of them that had went off. Because of the

(Testimony of J. B. Dickey.)

characteristics of this bomb, even though they come in for a skip bombing or dive bombing, if they were high enough and released at a certain altitude, they would tend to tumble and then straighten out in flight.

Q. And that might account for the fact that a lot of tail [243] fins were knocked off of them, wouldn't it?

A. Yes. The tail fins on this are very thin and this is, you might say, a pot metal, zinc alloy, and they could very easily be torn off.

The Court: How are they fastened on there, just slipped on?

A. Yes, they are molded.

The Court: Just molded on?

A. Just molded on when the bomb is manufactured. It is a form and it is molded right in there.

The Court: They nearly always come off when they are dropped from any altitude?

A. Yes, they do. Even the one that I tested for my own information, the tail was torn off of it.

Q. (By Mr. Loney): Have you had a chance to observe these exhibits that are 1, 2, 9, 10 and 11?

A. Yes.

Q. These objects are all portions of the particular bomb we are talking about, aren't they?

A. Yes, they are of all similar size.

Q. Did you have a chance to examine Exhibits 10 and 11? I think they fit together. In your opinion, you would say that is a part of the same piece, would you not?

(Testimony of J. B. Dickey.)

A. No, I couldn't certify the fact that they were of the same piece, even though they appear to be. They could [244] have been of two different bombs. It wouldn't necessarily have to have been the same one. However, the fact is that they are of a certain size and this indicates to me that they came from this type of bomb here, or the Mark-19 bomb.

Q. Well, now, getting back to whether they are part of the same piece, I am not asking you to certify, I just want your opinion as to whether or not you believe those two pieces were at one time part and parcel of the same object. You examine that. If it would help, we could take the strings off of there. I think you will find it is a pretty close match.

A. Yes, I would say that they appear to be.

The Court: It would be a very unusual coincidence that they would fit together that way if they weren't?

A. Yes, it would be. However, we do find it occasionally.

The Court: I suppose you would.

A. We do find occasionally that they do fit together.

Q. (By Mr. Loney): Well, you will notice there are certain little things——

A. Serations in there.

Q. Serations that match?

A. That indicate that they do match, yes.

Q. And even little parts on the end here (indicating)?

A. Yes, that's right. [245]

(Testimony of J. B. Dickey.)

Q. And to be just almost identical. Well, would you compare this with that bomb right there and tell me about what portion of that bomb this piece would occupy?

A. Well, it would occupy a portion along here and along in this vicinity here (indicating).

Q. I wonder——

A. You would have to measure it, I presume, in order to find out exactly. I imagine you would have to use a par of calipers, I believe.

Mr. Tugman: I am going to object to this line of testimony. I don't see it has any materiality at all. In the first place, this identification has not been admitted as an exhibit. There has been no qualification as to its derivation.

The Court: You mean the complete bomb here?

Mr. Tugman: No, the little one, the pieces.

The Court: That is in evidence.

Mr. Tugman: I don't believe so.

Mr. Loney: Yes.

The Court: Yes, they are admitted in evidence. They are the ones that were identified by the deposition of the man in Oklahoma. He testified he picked them up at a certain place and what they looked like, and so on.

Mr. Tugman: I'm afraid I don't see the materiality of this, though, particularly. [246]

Mr. Loney: I will tie it up, I believe, your Honor.

The Court: Well, all right.

(Testimony of J. B. Dickey.)

Q. (By Mr. Loney): Would you mind marking just the part that you think just shows——

A. I would say approximately here and here (indicating).

Q. Now, may I examine this?

The Court: Is that in evidence?

The Clerk: No.

The Court: It is not, is it?

Mr. Loney: Counsel, are you intending to offer this?

Mr. Tugman: I have no objection to offering that.

The Court: What is the identification of that?

Mr. Loney: 12, your Honor.

The Clerk: 12.

The Court: If there is no objection, 12 will be admitted in evidence here. It can be withdrawn, of course, after the case is over.

A. It is not a new one.

The Court: Oh. Well, if it is any use to the Navy, they can get it back.

A. Yes.

Q. (By Mr. Loney): Mr. Dickey, you have marked a red line that goes over this sticker that is placed on Exhibit 12? A. Uh-huh. [247]

Q. And the portion of the bomb that you are describing, then, would be from the red line toward the tail fins on this Exhibit 12, is that correct?

A. It would appear to be, yes.

Q. And, turning it over, it would appear that

(Testimony of J. B. Dickey.)

that cross-section is about two or three inches of the lettering on this Exhibit 12?

A. Yes. However, the fact should be brought out that not all of our practice bombs have this mark and mod., due to being manufactured at different localities and under different conditions, and so on. This was marked with this Bureau of Ordnance letter. There is some of them that are not marked.

The Court: Pardon me. In order to keep the record straight here, these various parts of the whole practice bomb were identified on the cross-examination of Sergeant McCammon; as the Defendant's Exhibit 12, the 13 pound practice bomb; 12-A, the retaining pin; 12-B was the cartridge which was withdrawn for safety reasons; and 12-C, the retainer, that little—I think you call that, is that right? What do you call it?

A. Detonator.

The Court: The detonator?

A. Detonator holder.

The Court: All right: It seems to me that if one is [248] to go in, they all should.

A. Yes, they are integral parts of the practice bomb.

The Court: If there is no objection, they will all be admitted. To keep the Clerk's records straight, 12, 12-A and 12-C will be admitted.

A. They are interchangeable.

The Court: All right, proceed.

(Testimony of J. B. Dickey.)

(Whereupon, the said objects were admitted in evidence as Defendant's Exhibits 12, 12-A and 12-C.)

Q. (By Mr. Loney): I think you had just finished telling us that actually not all the bombs were marked with this mark?

A. That is correct, yes.

Q. And that since this portion that is shown by Exhibits 10 and 11 came from the same place where the marking appears on Exhibit 12, you would expect markings to appear on Exhibits 10 and 11, would you not?

A. Not necessarily.

Q. Well, you would either expect them to be there or you would expect that this bomb had not been marked?

A. Yes, that is correct, I would expect it not to be marked. As has been brought out, some are marked and [249] some are not.

Q. Handing you Exhibit 2, would it appear to you that the way this end is encrusted, that it had been dropped from a fairly high altitude or at a fairly high rate of speed?

A. I would say that it had, yes, due to the fragmentation of the practice bomb and also——

Q. The imbedding?

A. The imbedding of the material in the detonator.

The Court: What number is that?

Mr. Loney: Exhibit 2, your Honor.

A. This probably took place by landing on a rock

(Testimony of J. B. Dickey.)

or something of a similar nature caused a shattering effect.

Q. If it would strike a rock, then——

A. It would shatter.

Q. And that probably was fired because of the way it struck? A. Yes, drove it up in.

Q. Is it the striking the rock itself or the explosion, or what is it that causes it to shatter like this?

A. Well, it is of a shatterable nature. Then it could very easily have happened due to the force of motion, either by striking a rock or by landing upon a solid enough surface to cause it to.

Q. Referring to Exhibit 1, now am I correct that once you [250] put this pin in the end of the bomb, you then must do something to the bomb to seal the pin in there?

A. You lead it over. In other words, you take a small hammer and peen it over so that it retains the pin in there and it won't drop out.

Q. And this would make the pin less easy to see, wouldn't it?

A. Yes, I presume. However, if you look in the end of it, you would see the pin there.

Q. But if you did have material in the end, you might not see it then? A. That is correct, yes.

Q. Well, if this had been dropped and not exploded, your opinion would be that perhaps it hit some soft sand or something or material that gave and didn't get the force necessary to explode it and, consequently, it became a dud?

(Testimony of J. B. Dickey.)

A. Yes, it could hit on an angle, hit on an angle that way (indicating) in a soft material, and not detonate it.

Q. I suppose, actually, it could hit an angle straight down, if the material were soft enough, couldn't it?

A. No, these could be detonated from a high enough altitude by hitting on water or anything of that nature.

Q. I see. Just so the blow is solid on the [251] end?

A. That's right, and the motion, the force of motion being applied, it would.

Q. But if the blow is at an angle, then you don't——

A. Then you don't get your correct motion from it.

The Court: Is it true, Mr. Dickey, that where in service or practice ammunition, that there is always a certain percentage of defect which will cause duds, even when it is handled properly?

A. That's right, yes. You have your human element, we call it human element, which accounts for a percentage of failures; duds, in other words. That is due to manufacture, faulty manufacture or construction, and so on.

Q. (By Mr. Loney): And if you add to that factor you already have the fact that the bomb might be dropped on an angle, that would lead you to believe there would be more duds than normal?

A. That is correct, yes.

(Testimony of J. B. Dickey.)

Q. You have no reason to think that all of those exhibits which are portions of a bomb have not been dropped from an aircraft or some high altitude object, have you? A. Well——

Mr. Tugman: I am going to object to that. I don't think that that is right, I think that is——

The Court: I think that question is objectionable. You might ask him if, from the information he has, he has [252] any opinion about it. The fact that he hasn't any reason to believe differently, I don't think would be proper. You can ask him if he can express an opinion as an expert.

Q. (By Mr. Loney): In your opinion as an expert, would you tell me whether or not you believe these were dropped from an airplane or similar object?

A. Yes, I could say with reasonable certainty that they were dropped from an aircraft.

Mr. Loney: No further questions.

The Court: Do you have any further questions, Mr. Tugman?

Mr. Tugman: Yes, I do.

The Court: I thought we might get through with this witness before recess. Are you going exhaustively into redirect?

Mr. Tugman: No, your Honor.

The Court: All right.

Mr. Tugman: I just have a few questions.

(Testimony of J. B. Dickey.)

Redirect Examination

By Mr. Tugman:

Q. Showing you Plaintiff's Exhibit 2, counsel asked you if the material in the end of this bomb could not have ben forced in by dropping.

A. It could have been forced in by dropping. The [253] assumption was that it was dropped from an aircraft.

Q. Could it have been forced in by lying in a gulley or something of that nature washing into it over a period of time?

Mr. Loney: I think that is just a little bit leading, your Honor.

The Court: Yes, that is quite leading.

Mr. Tugman: Well, I think as an expert witness——

The Court: Well, you are not supposed to lead your own expert. He is your witness, you are not cross-examining him.

Q. (By Mr. Tugman): Is there any other way in which this material could have gotten in here?

A. Yes, there is.

Q. How?

A. By any weighty object or anything else hitting against that, say a rolling stone or anything like that, due to the action of water or anything. The same as a hammer, you can drive a nail through a piece of wood, but you don't normally find it. Unless it is driven through there, you don't

(Testimony of J. B. Dickey.)

expect it to get through there, and the same would take place here if, say, rolling stone or anything like that, due to the force of the water hitting against that and it being wedged in a manner, it would drive it in, and it is very [254] possible.

The Court: Your opinions are based on probabilities, though, aren't they, not possibilities?

A. Not possibilities, in as much as we have found material driven in to items before of a similar nature.

The Court: What I had in mind, if you see foot prints along the sand, you assume someone walked there?

A. Someone walked there.

The Court: Not some acrobat walked there on his hand with his shoes on his hands?

A. No, that is correct.

Q. (By Mr. Tugman): You have seen ordinance, though, that has been encrusted from just lying about? A. Yes.

Mr. Tugman: I have no further questions.

The Court: Do you have anything further, Mr. Loney?

Mr. Loney: There is just one thing, your Honor.

Recross-Examination

By Mr. Loney:

Q. You heard Mr. Coffey testify that he struck it about four times and it went in quite a ways?

A. Yes.

(Testimony of J. B. Dickey.)

Q. Would you then asume that he was driving it from the small end? [255] A. Not necessarily.

Q. He could have been pushing the cap on through?

A. He could have been pushing it on through against the shoulders. If you will examine this unloaded one here, you will see—see, the shoulders are down there (indicating), and he could have been driving it on through against those.

Q. I see what you mean. Could it have been fired driving it the other way?

A. Yes, it could have very easily.

Mr. Loney: That is all the questions I have.

The Court: It could be fired either way, either by punching the shell against——

A. Yes, your Honor, it could by hitting the primer in there.

The Court: All right, then, court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. Dickey: Did you want me to stay?

The Court: No, no, if counsel has no objection, the witness who just testified, Mr. Dickey, may be excused.

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes.

(Witness excused.) [256]

Captain Smith.

E. B. SMITH

having previously been sworn, resumed the stand on behalf of the defendant, and testified further as follows:

The Witness: Must I be sworn again?

The Court: No, you have already been sworn, just sit down.

Direct Examination

By Mr. Tugman:

Q. You live in Kennewick, Captain Smith?

A. Yes.

Q. You were a Captain in the United States Naval Reserve, retired? A. Yes, sir.

Q. How many years of Navy service have you had?

A. Well, I have had a total of 37, including active and inactive.

Q. Would you please describe what the nature of your service with the Navy was?

A. Well, that would be quite a long story.

Q. Well——

The Court: Only that part of it that might be pertinent here, is all we are interested in.

Mr. Loney: I will admit the Captain's qualifications. [257]

Q. (By Mr. Tugman): Captain, you were in command of the Pasco Naval Air Station for a period of time, were you not? A. Yes, sir.

Q. What were those dates?

A. I planned the station, beginning in January,

(Testimony of E. B. Smith.)

1942, put it into commission July the 31st, 1942, and retained command of it until August the 23rd, 1944.

The Court: Do you call that the Pasco Naval Air Station?

A. It was the Pasco Naval Air Station, yes, your Honor.

Q. (By Mr. Tugman): Showing you Plaintiff's Exhibit 8, would you please point out on that map the location of the Pasco Naval Air Station?

A. This is—the other map.

Q. Benton County, the one I want is here.

The Court: You want 15.

Mr. Tugman: The maps have similar lines to me.

Q. Plaintiff's Exhibit 15, will you please point out the Pasco Naval Air Station?

A. Right here (indicating).

Q. What were the characteristics of that air station, Captain?

A. Well, that air station originally was built for primary training. [258]

Q. What do you mean by primary training?

A. Well, that is where the Naval aviation cadets were given their initial training, they become embryonic aviators.

Q. What type of activities were carried on at that station?

A. Well, until November 1, 1943, it was primarily for primary training, no military activity, just flying activities.

(Testimony of E. B. Smith.)

Q. Just flying activities. And after that date, what kind of activities?

A. At that date, the station was converted over to the training of carrier air groups, combat aircraft for the Navy.

The Court: I didn't get the date?

A. November 1, 1943, sir.

The Court: Thank you.

Q. (By Mr. Tugman): While you have that map there, I will digress for a minute. There are other areas blocked out on that map. Would you please explain what those areas are?

A. Well, all of these areas were outlying flying fields that were used in connection with the primary training.

Q. Were any of those areas blocked out on that map used for the purpose of bombing?

A. Well, when the conversion of the station was made, 10 [259] of those areas were used for bombing targets of various kinds of bombing.

Q. Now, which areas were those?

A. Well, I'm not so sure that I can recall every one of them. I recall that this was one, this was one, this was one, that was done, this was one, and this was one (indicating).

Mr. Loney: Excuse me, Captain, I am wondering if they have numbers on them? I wonder if you could refer to the numbers?

The Court: Yes, that would make a better record.

(Testimony of E. B. Smith.)

A. Yes. Well, No. 13, No. 3, No. 4, No. 7, No. 9, No. 10, No. 5 and No. 6.

Q. (By Mr. Tugman): Now, what were the other areas blocked in there that you haven't named, what were those used for?

A. Those were outlying flying fields.

Q. Planes landed and took off from those?

A. Practice landings.

Q. Practice landing fields?

A. That's right.

Q. What type of bombing activities were carried on on those fields that you mentioned?

A. Well, there was dive bombing——

Q. I will relieve you of this. [260]

A. ——using miniature practice bombs; there was glide bombing using 100 pound water-filled bombs; there was skip bombing using 100 pound water-filled bombs. I think that is all of the various types of bombing that was done there.

Q. What was the nature of that bombing? What type of bombing did they do?

A. Well, in dive bombing, a good dive bombing run is one where the plane comes down at 70 degrees to the horizontal and aims the airplane at the target and releases his bomb.

Q. Were those operations confined to any particular type of bombing?

The Court: Any particular type of what?

Mr. Tugman: Of bombing.

A. Well, they were always using miniature practice bombs only.

(Testimony of E. B. Smith.)

Q. In other words——

A. The dive bombing, now.

Q. In other words, were the activities in that area confined to dive bombing or skip bombing?

A. Oh, yes, dive bombing and skip bombing.

Q. Out of the Pasco Naval Air Station, were any level flight missions flown?

A. Not for the purpose of dropping [261] bombs.

Q. Not for the purpose of dropping bombs. For any other purpose were they flown?

A. Oh, yes, they flew tactical training missions.

Q. And by that you mean formation?

A. Formation practice, yes.

Q. What type of miniature practice bombs were used in these operations, Captain?

A. In the dive bombing practice?

Q. Yes?

A. Well, I don't know the Mark number and the mod. number, but they were smaller than this one that you see here (indicating) that has been introduced in evidence.

Q. Showing you Defendant's Exhibit 12, was this type of bomb used? A. It was not.

Q. It was not used in the Pasco operations at all? A. No, sir.

The Court: Let's see, what is that number?

Mr. Tugman: Defendant's Exhibit 12.

The Clerk: 12.

Q. (By Mr. Tugman): Where were the length

(Testimony of E. B. Smith.)

of the runways at the Pasco Naval Air Station,
Captain? A. 4,400 feet.

Q. Is there any particular significance to the
length of those runways? [262] A. Yes, sir.

Q. Would you please tell us what the significance of that is?

A. When the Secretary of the Navy originally approved the construction of that air station, it was approved for the purpose of primary training and to be so constructed that it could be readily converted to the training of carrier air groups, and the length of the runways were established as those being necessary for carrier-type aircraft.

Q. That is the length of runway that a carrier-type aircraft requires? A. Yes.

Q. Now, are those runways long enough to support larger aircraft? A. No, sir.

Q. Were any larger type aircraft used?

A. No, sir.

Q. There were no B-17's or bomber-type planes used there at all? A. No, sir.

Q. Have those runways, to your knowledge, ever been changed in their length? A. No, sir.

Q. They are the same length today? [263]

A. Yes, sir.

Q. Do you know, Captain, what length of runway a bomber-type plane would need?

A. It would require 7,000 feet.

Q. I see.

A. That is, the type used during World War II.

Q. As I understand your testimony, no planes

(Testimony of E. B. Smith.)

requiring such length of runway were ever used on that airstrip, is that correct?

A. That is correct.

Q. Now, where did the planes come from that used the Pasco Naval Air Station?

A. The air groups were assembled at Naval Air Station, Seattle, and drew their equipment there, drew their airplanes and their other equipment at Seattle, and personnel were assigned there, then they were flown over to Pasco and began their training.

Q. Where did these planes pick up their ordnance?

A. You mean—they picked it up at Pasco.

Q. They picked it up at Pasco?

A. Yes, sir.

Q. Was there any reason they did not pick their ordnance up in Seattle?

A. Nothing to stop them, but it wouldn't have been regular.

Q. Why do you say it wouldn't have been [264] regular?

A. Well, because they are not supposed to be carrying loose ordnance around inside of an airplane, and they are not supposed to be carrying bombs hanging on a bomb rack and flying over populous areas.

Q. To your knowledge, Captain, did any of the other services use these bombing areas at all?

A. These bombing targets around the Pasco Air Station?

(Testimony of E. B. Smith.)

Q. Yes? A. No, sir.

Q. The ones that you have pointed out?

A. They did not.

Q. To your knowledge, did the Army Air Corps have any fields for bombing in the area?

A. Oh, yes.

Q. Where were those, Captain?

A. Well, they had one at Ephrata; here in Walla Walla; Pendleton, Oregon; Redmond, Oregon; Madras, Oregon. I think that is all.

Q. Did you have any arrangements with the Army Air Corps people as to flying zones or anything like that?

A. Yes, sir, we had an arrangement by mutual agreement with the Commanding General of the Second Air Force, headquarters, Fort George Wright in Spokane—his name is Major General Oles—Admiral Wagner, who was Commander Fleet Air, Seattle, and myself. [265]

Q. What arrangement was that?

A. In that section of the country out to the west and northwest of the air station, the Navy agreed that it would confine its flight operations under 6,000 feet and leave the Air Force or the Air Corps have the space above 6,000 feet.

Q. Was there any particular reason for that?

A. Yes, sir. The reason the Air Corps gave was they had a target called Saddle Mountain Target just north of Saddle Mountain and it was for horizontal bombing.

Q. By horizontal bombing, you mean what?

(Testimony of E. B. Smith.)

A. I mean that the airplane, at the time the bomb is released, is flying in a horizontal position.

Q. I see.

A. And they had a target north of there and in making runs on that target, they would have to square away for considerable distance before reaching the target area and they didn't want any dive bombers coming down through their flight pattern.

Q. I see. Now, subsequent to the time that you were in the Pasco Naval Air Station, you were stationed in Seattle, were you not? A. Yes, sir.

Q. And during that period of time, what was your occupation there? [266]

A. I was the Chief Staff Officer to Commander, Naval Air Bases, who was the immediate superior in command of the 12 Naval Air Stations that were located in the 13th Naval District.

Q. And in that capacity, did you have any connection with the Pasco Air Base?

A. Yes, sir. They conducted inspections of the Pasco Air Base, along with these other air stations, at periodic intervals.

Q. Were you familiar with the operations that were carried on there? A. Yes, sir.

Q. At that period of time. Now, Captain, are there any regulations or orders to your knowledge, or were there any regulations or orders during the time that the Pasco Naval Air Station was being used, which pertained to safety regulations of pilots carrying ordnance, live ordnance?

(Testimony of E. B. Smith.)

A. There is always orders and safety regulations.

Q. Would you describe what those orders were?

Mr. Loney: Excuse me, Captain, just a minute.

I would like to object to that, if your Honor please. I think that we are concerned here not with the orders, but perhaps with a violation of them. I don't think that that would be material as to the orders. I mean, the [267] orders that were given to the pilots, I don't think would be material in this action.

Mr. Tugman: If the Court please, I think they would be material to show the conditions under which Naval aircraft operated.

The Court: If they operated according to regulation, I assume, there may be some probative value or some inference that might be drawn. Although I don't know so much about Naval flyers, but I know about Air Corps flyers, it would be a violent assumption that they always obey regulations, but you may proceed with it. I think it might have some probative value.

Q. (By Mr. Tugman): Would you please state what they were?

A. Yes, we had station regulations.

Q. What was the nature of those station regulations?

A. Well, they involved the regulation of the various departments of the station. They were orders that were of a permanent nature.

(Testimony of E. B. Smith.)

Q. Were there any orders regarding the carrying of ordnance? A. Yes, sir.

Q. Did those orders specify as to how that ordnance should be handled by flyers?

A. In addition to station regulations, you have safety orders. [268]

Q. Yes?

A. That concerns the immediate handling of ordnance material. It involves the personnel who actually have their hands on it, how they handle it. The station regulations did prescribe that certain of those outlying fields were used for certain target purposes and they were enumerated in these station regulations. In other words, they were assigned for certain purposes, some of them for dive bombing, some for glide bombing, and some for skip bombing.

Q. I see. Now, did these regulations specify where ordnance should be dropped or how it should be used? A. Yes, sir.

Q. What did they say?

A. They simply say that those fields that are numbered on this map right here, a certain numbered outlying field was to be used for a certain type of bombing target and not for anything else.

Q. Did the station regulations have anything to say about the use of ordnance in areas other than those designated?

A. Why, certainly, it prohibited the dropping of ordnance anywhere except in those designated areas and approved areas.

Q. Now, Captain Smith, if ordnance had been

(Testimony of E. B. Smith.)

dropped in [269] areas other than the designated areas, would that have constituted a violation of those orders? A. Yes, sir.

Q. Were any such violations reported to you during the time that you were Commanding Officer, or have you heard about any in your capacity at Seattle? A. Never.

Mr. Loney: Excuse me, Captain. I think that is perhaps a little far afield, your Honor, and sort of a negative hearsay, whether the Captain has heard of any violation of orders.

The Court: I will sustain the objection to that.

Mr. Tugman: If the Court please, I think I can—I will ask another couple of questions here first.

Q. If any violations had been reported, Captain, would they have come to your attention?

A. Yes, I am sure they would have.

Q. It was part of your job? A. Yes, sir.

Q. I will ask again, then, did you hear of any violations of these orders?

Mr. Loney: Excuse me, Captain. I will make the same objection, your Honor.

The Court: Well, he may answer to prove at least he didn't know of any. [270]

A. I have no recollection of any violations ever having been reported while I was Commanding Officer of the station nor while I was Chief Staff Officer at Seattle.

Q. (By Mr. Tugman): I see. Now, Captain, in regard to these bombing areas, were any safety precautions taken as to the areas themselves?

(Testimony of E. B. Smith.)

A. Yes, they were posted, in accordance with instructions from the Chief of Naval Operations, and they were fenced, all of them were fenced with 3-strand barbed wire fence.

Q. What did these regulations require as to posting and fencing?

A. I don't remember at this time what the interval was that we posted around there.

Q. To the best of your recollection, what was the interval?

A. I would say it must have been around 200 feet, but I can't guarantee that.

Q. Were these operations carried out in respect to these areas? A. Yes, sir.

Q. Have you had occasion to visit any of these bombing areas since the war?

A. No, I haven't been actually on any of them, but there is one there, the one in Benton County, that I think [271] the sign is still there. It was some few months ago.

Q. I see. You have seen them yourself?

A. From the highway, you see it from the highway.

Q. I see.

Mr. Tugman: You may examine.

The Court: While I think of it, Mr. Loney, I was going to ask the Captain this: I think I was confused yesterday on Saddle Mountain, I think I had in mind Frenchman Hills up in Grant County. Saddle Mountain is in Benton County, isn't it, do you know, or Yakima County?

(Testimony of E. B. Smith.)

A. Your Honor, I don't know. Saddle Mountain runs east and west and is north of the Columbia River, and I was under the impression——

The Court: Oh, north of the Columbia?

A. Yes, sir.

The Court: Oh.

A. Yes, sir.

The Court: And Frenchman Hills——

A. Is on the northern slope of Saddle Mountain.

The Court: Oh, I see. Well, I was right after all, then. I get them confused with Rattlesnake Hills. Saddle Mountain on one side and Frenchman Hills up there near on the other.

A. On the northern side of Saddle Mountain.

The Court: Yes, I know where it is, then. [272]

Cross-Examination

By Mr. Loney:

Q. In making their approach to Saddle Mountain, these bombers came in from the south?

A. That is what General Olds told us.

Q. And they might have swung down, then, as far as below the Yakima River to make their approach; otherwise, you wouldn't be interfering with their flight pattern, A. That is correct.

Q. That sign that you mentioned, I think that was published in the newspaper awhile back, wasn't it? Do you recall that, Captain Smith?

A. Well, I think that we built a road out there from the highway that goes from Kennewick to

(Testimony of E. B. Smith.)

Prosser, an access road, and that access road was used by the public after the war ended as a short cut over to Enterprise, and the occasion which I think that you mention now was brought about by the railroad company closing that road to public use.

Q. Would this be the sign that you had in mind (indicating photograph)?

A. No, no, no, that one says "Navy Bombing Target."

Q. Captain Smith, you heard Sergeant McCammon's testimony yesterday?

A. Say that again, please. [273]

Q. Excuse me. You heard Sergeant McCammon's testimony yesterday about the fact that he had run across these bombs in the areas that are shown on Exhibit 8 and marked with his initials there? They are these areas that are shown with his initials (indicating).

A. Yes, but here is the target here (indicating.)

Q. I'm sorry, that is not correct.

A. The target is here, yes.

Q. Shown by his initials, and this area——

A. Those are my initials.

Q. Your initials?

A. That is where the target is.

Q. Well, these are his initials, Russell W. McCammon. A. Uh-huh.

Q. He indicated that he had found those objects in that area. You heard that yesterday?

(Testimony of E. B. Smith.)

A. Yes, I heard it. Did he say these objects or——

Q. I believe he said these objects, these practice bombs.

You also heard the testimony of Mr. Dixon who testified yesterday and he marked the map here to show the location where he had found these objects?

A. Yes, I heard his testimony, but I didn't see where he marked the map.

Q. If my memory serves me correctly, he said he had found them on the range, as well as these two areas that he [274] circled here (indicating).

The Court: I am not sure that I got your testimony as to how long you were in charge of the Pasco Station or Field, Captain?

A. It was from the time of its inception.

The Court: And then it was changed over to carrier plane practice?

A. On November the 1st, 1943. I continued in command until August the 23rd, 1944.

The Court: Oh, I see. Did it operate after that?

A. Oh, yes, sir.

The Court: Who was in charge after you left there?

A. Well, there was a Captain Shoemaker and a Captain Erdmann.

The Court: Were these fields used for bombing practice after that, after you left?

A. Yes, sir.

The Court: Do you know for how long?

A. Well, I presume they continued to operate (Testimony of E. B. Smith.) until the war in the Pacific, the shooting war, stopped.

The Court: That was about August, '45.

A. Yes, sir.

The Court: All right, go ahead, Mr. Loney.

Q. (By Mr. Loney): You are familiar with some of the things that they are finding every day around there? [275] A. No.

Q. I mean, do you hear about them?

A. No, except in this courtroom.

Q. Do you remember the article in the paper the other day about somebody found 100 pounds of T.N.T. out there in the area?

A. No, didn't see that. I saw where somebody found a land mine.

Q. Well, did you read the article in the newspaper about the boy that took his teacher a bomb the other day? A. No, I didn't.

Q. Well, isn't it possible, Captain Smith, that there is more ordnance on those ranges out there than just your miniature dive practice bombs?

A. Well, the water-filled bombs, when they hit, of course, they just kind of roll up in a ball, the sheet steel does. It is made of very light sheet steel and there should be tons of that out there. There should be thousands of the miniature practice bombs. Not this type, but the smaller type that was used for dive bombing.

Q. But those weren't made of lead, were they?

A. No, not to my knowledge. I have dropped

(Testimony of E. B. Smith.)

dive bombing type of practice bombs for many years and I never saw one made of this material until I came in this [276] courtroom.

Q. Is it possible, Captain Smith, that in your position as Commander of the Pasco Naval Station, you might not have been familiar with the type of ordnance they were using? Is that a possibility?

A. It is customary for the Commanding Officer to make weekly inspections, material inspections, and one of the departments to be inspected, of course, is the ordnance department and the magazines, and I never recall ever having seen one of these Mark-19 bombs.

Q. You are familiar with the type of aircraft that was being used by the Navy for dive bombing and skip bombing? A. Yes, sir.

Q. Would this be a fair statement, Captain Smith, that it is very possible that a man flying one of those ships could accidentally hit the wrong button and drop his load? A. No.

Q. It is not possible?

A. No. If you wish me to explain, I will, or do you just want me to answer questions now?

Q. Well, no, I will give you a chance to explain, but if a Navy pilot said it was possible to do that, you would say he was wrong?

A. In this instance, yes. [277]

Q. Now, what do you mean by this instance?

A. Well, the only type of airplane that we had on that station that was ever designed to drop a bomb from a horizontal position was the TBM and

(Testimony of E. B. Smith.)

the TBF. That was our torpedo planes and those airplanes originally came equipped with that Norden bombsight that you heard much about during the war as being that very secret, secret, secret business. And when they drew their airplanes from Seattle to come over here, those bombsights were removed from the airplane because the Navy no longer used horizontal bombing with that type of airplane, and the reason they didn't is because of improvements in the aerial torpedo which was more effective than the bombs. Improvements had been made where the torpedo could be dropped from considerable altitude and at much higher speeds than previously. So all their training over there with those TBM's and TBF's was geared to training these people to drop torpedos.

Now, of course, they didn't drop any torpedos over there, and when they reached that stage of their training, they flew the planes over to Whidbey Island and actually dropped torpedos over at Whidbey Island Naval Air Station.

Q. Captain, these aircraft, the agreement that you made with the General in Spokane called for their flying at [278] an altitude in excess of 6,000 feet?

A. That is correct, sir.

Q. And your altitude limitations were what, again?

A. Below 6,000 feet in that sector.

Q. In that sector?

A. Now, down at some of these other sectors, we could go anywhere we wanted to.

Q. You heard Mr. Dickey's testimony that these

(Testimony of E. B. Smith.)

bombs were to be dropped below an altitude of 6,000 feet? A. This type?

Q. Yes, you heard his testimony?

A. Yes, I heard it.

Q. Then, if the Army dropped the bombs there, they would be dropping them at an altitude in excess of 6,000 feet?

A. Well, 6,000 feet or higher, if they were dropping that particular bomb.

Q. These bombs could be dropped from almost any type of plane, could they not, any type of Naval aircraft?

A. I would think this bomb could be dropped from any type of Naval aircraft if it had the right bomb rack there to hold it.

Mr. Loney: No further questions. [279]

Redirect Examination

By Mr. Tugman:

Q. To clarify, Captain Smith, after you left the Pasco Naval Air Station, you went to Seattle for how long? A. Ten months.

Q. And during that period of 10 months, you had cognizance of all the operations at the Pasco Naval Air Station?

A. Yes, sir. That is, I personally didn't; the Commander had cognizance of them and I was his Chief of Staff.

Q. I see. Captain Smith, showing you Exhibit 12 again—I won't lift it up there, you can see it—

(Testimony of E. B. Smith.)

is there any particular reason why that bomb is smooth and machined like that?

A. Yes, I think there is a reason why that bomb is smooth. In horizontal bombing from any height, it is important that the ballistic of the bomb be consistent.

Mr. Loney: Excuse me, Captain, have you been qualified as an ordnance expert?

A. No, but I have been qualified as a bomber.

Mr. Loney: Bomber. Thank you.

A. Pilot.

Q. (By Mr. Tugman): Are you trained, Captain, in the characteristics of ordnance that you drop?

A. I should explain that I am a Naval aviator and Naval aviators, in order to get that designation, have to go [280] through this training, certain amount of training in ordnance, including bombing, the actual dropping of bombs.

Q. Are you trained in the characteristics of the bombs that you drop? A. Oh, yes.

The Court: Well, he may answer. I think he has answered about the reason it is smooth.

Mr. Tugman: I see.

The Court: So it will drop accurately.

Q. (By Mr. Tugman): Now, what were the characteristics of the bombs used in dive bombing and skip bombing?

A. The dive bombing ones are smaller, considerably smaller, than this, made of cast iron, all those

(Testimony of E. B. Smith.)

I have ever seen or ever used, and the surface could be rough.

Q. Why could the surface be rough?

A. Well, because the nearer the vertical that you drop this thing, the less the ballistics of the bomb has a factor or is a factor in the accuracy of the bomb.

Q. I see.

A. And cost, of course, is the big thing, for keeping the cost down.

Mr. Tugman: No further questions. [281]

Recross-Examination

By Mr. Loney:

Q. In other words, if you drop it straight down, it could be lots more rough?

A. It could be a cannon bomb, it could be a rocket, could be anything.

Q. And these, then, being smooth, you would expect these to operate better if they were dropped at an angle?

A. From a level flight. You see, in order to use the Norden bombsight, you must know the ballistics of the bomb, know the characteristics of the bomb, how much it is going to trail, just exactly what flight path it is going to follow. Now, in order for those to be consistent, they have got to be the same shape, the same size and the same weight the same degree of smoothness.

(Testimony of E. B. Smith.)

The Court: It has to follow a consistent trajectory?

A. That's right, your Honor.

Redirect Examination

By Mr. Tugman:

Q. Then, as I understand it, Captain, in the dive bombing operations and skip bombing, what is the method of aiming in those operations?

A. You aim the airplane.

Q. So that the ballistics of the bomb is not of great [282] importance?

A. No, it is not of great importance. The skill of the pilot is the big thing.

Mr. Tugman: I have no further questions.

The Court: Any other questions?

Mr. Loney: No, I think not.

The Court: That is all, then.

(Witness excused.)

Mr. Tugman: Defendant rests, your Honor.

(Defendant rests.)

The Court: All right. Do you have any other witnesses, Mr. Loney?

Mr. Loney: Yes, I would like to put on a short witness right after lunch, if your Honor please. Would that be all right. It might be a very short rebuttal, might not, I don't know.

The Court: Yes. Well, all right, you can wait

until after lunch if you don't have any extended rebuttal.

Mr. Loney: No.

The Court: It is too late to go into it now, anyway.

I think that we should have some understanding about time. I always have a time limit when there is a jury and I should treat myself as well as I do the juries, [283] I think. Would an hour on a side be sufficient in this case?

Mr. Loney: Fine, yes, your Honor.

The Court: That is, to be as a maximum time of argument.

Mr. Tugman: Yes.

The Court: Oh, yes, I assume you want your 15 in evidence here?

Mr. Loney: I think I offered it.

The Court: Plaintiff's Identification 15 has not been admitted in evidence.

Mr. Loney: I think I offered it.

The Court: And Captain Smith pointed out the bombing target areas there on it.

Mr. Tugman: And this identification back here, your Honor, I don't know quite what to do about it. It is the bomb that was picked up by the plaintiff yesterday from the bombing range from a friend of his. But the thing has a possibility of being——

Mr. Loney: That was withdrawn.

The Court: What was the testimony regarding that?

Mr. Loney: It was picked up——

The Clerk: I understood that plaintiff's attorney withdrew that last night.

The Court: Yes. [284]

Mr. Tugman: I want to take it out of the custody of the Clerk, but I wanted it to be before the Court as something to consider. I don't know quite how to do that without seeing the possibility of its being alive, which is the only reason we took it out.

The Court: Let's see, what does it look like here? It looks like the others, doesn't it, like No. 1?

Mr. Loney: Yes, your Honor.

The Court: And what was the testimony regarding this now? I haven't that clearly in mind.

Mr. Loney: Mr. Coffey got this from a friend of his just a few days ago who had gotten it from the range.

The Court: Oh, I see.

Mr. Loney: We were looking for one to bring to court.

The Court: Oh, I see.

Mr. Tugman: And picked it up from the range just a few days ago.

The Court: Well, I think since the Court has seen it here, the record may show it is generally similar in appearance to No. 1. Is that acceptable to counsel?

Mr. Loney: Yes, your Honor.

The Court: To Plaintiff's Exhibit 1, and then you may take it out because I don't want to take a chance on anything around here that it may not have been detonated. [285]

Mr. Tugman: Generally similar except for one

thing, and I don't know whether I am at liberty to point it out to the Court or not. That is the only thing I wanted it in for.

The Court: What is the difference that you have in mind?

Mr. Loney: Oh, this shows a pin, your Honor.

The Court: It shows the pin? Oh, I see, yes.

Mr. Tugman: In the missile, your honor.

The Court: Oh, yes. This Identification No. 14, the record may show it has the pin in place and visible in the larger end.

Mr. Tugman: Yes.

The Court: Of the bomb. All right.

Now, are there any other exhibits here, Mr. Granger, that have been identified and haven't been admitted? I just want to be sure that none have been overlooked.

Mr. Granger: No, your Honor.

The Court: 15 will be admitted now, that map. I think that was marked as Defendant's 15, wasn't it, or is it Plaintiff's?

Mr. Loney: I would like to have it defendant's exhibit because I don't know about it.

The Court: It is marked as Defendant's Exhibit 15 and I think that is what it is. It will be admitted. [286]

Mr. Tugman: Yes.

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 15.)

The Court: There are no other, you say, Mr. Granger?

The Clerk: That is all.

The Court: All right, Court will recess, then, until 1:30.

(Whereupon, the trial in the instant case was recessed until 1:30 o'clock p.m., this date.) [287]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to wit.)

The Court: All right.

Mr. Loney: Will you take the stand just a moment?

J. B. DICKEY

having previously been sworn, resumed the stand in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Mr. Dickey, you have heard the testimony, I think, of the deposition yesterday, about the fact that these objects were found over three or four acres in extent. In your opinion, would that be consistent had they been dropped from an aircraft?

Mr. Tugman: I am going to object to that. I don't think he is an expert on anything but ordnance, he is not an expert on how aircraft drop them.

A. Should have asked Captain Smith that question. I don't feel that I am qualified to answer that. [288]

(Testimony of J. B. Dickey.)

The Court: Yes, all right.

Q. (By Mr. Loney): Do you recall making an observation about that fact earlier today just before lunch?

A. Yes.

Q. You did express an opinion?

A. I expressed an opinion, but it was my own personal opinion, the fact that——

Q. Very well.

The Court: All right.

Mr. Loney: That is all, sir.

(Witness excused.)

Sergeant McCammon.

Would it be permissible for me, your Honor, just to ask Captain Smith that question while he is right there and save the time of coming up?

The Court: Well, I think he should come up here where the reporter can hear him. It always one question leads to another and probably there would be some cross-examination. I think this witness may take the stand. [289]

RUSSELL W. McCAMMON

having previously been sworn, recalled in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Sergeant, you may have made this testimony earlier, but I wanted to be sure by way of rebuttal.

(Testimony of Russell W. McCammon.)

You are familiar with the objects that have been identified as Exhibits 1, 2, 9, 10, 11 and 12?

A. Yes, sir.

Q. And I believe, am I correct, did you testify yesterday that you found those objects or objects similar to those on the bombing range near Richland, as well as in an area adjacent to the bombing range? Am I correct?

Mr. Tugman: I am going to renew my objection to the introduction of this testimony without definite showing as to which objects were found, where and when and how.

The Court: Well, you may make it more definite, if you wish. The objects are the ones similar to those.

Q. (By Mr. Loney): I am referring to them specifically. They would be Mark-4 13-pound practice bombs.

A. Yes, sir, I have.

Q. And you have found those in that area near Richland, is that correct, sir?

A. Yes, sir. [290]

The Court: And when?

Mr. Loney: Oh.

Q. Could you tell us about when that was?

A. At various times.

The Court: Just a moment.

Mr. Tugman: Pardon me.

The Court: Did you have an objection?

Mr. Tugman: Yes, your Honor. My point is this, that, referring to the exhibit here, Captain

(Testimony of Russell W. McCammon.)

Smith testified this morning that these objects were dropped—I mean, there were several dive bombing ranges around here. Now, there has been no identification as to the exact area. I think that the witnesses should be required to identify with particularity the area.

The Court: Well, I think he is talking about the area that he marked on the other exhibit there, the other map. The witness marked an area that he said was the bombing range, did he not?

Mr. Loney: Yes, your Honor.

The Court: On—what is your exhibit there, that other map right in front of you?

Mr. Loney: Oh, it is that one. This is Franklin County, this has not been admitted.

The Court: Oh, I see. That is Exhibit——?

The Clerk: 8. [291]

The Court: Exhibit 8?

The Clerk: Yes, your Honor.

The Court: And I assume that the Sergeant is talking about the same area that he marked out on Exhibit 8; is that correct, Sergeant?

A. Yes, sir.

The Court: So that is the identification of the place marked out with his initials on it on this map, Exhibit 8.

Mr. Loney: Right here (indicating).

Q. As I understand it, there is only one bombing range in Benton County?

A. To my knowledge, that is the only one I have ever found.

(Testimony of Russell W. McCammon.)

Mr. Loney: That is all the questions I have.

The Court: Any cross-examination of this witness?

Mr. Tugman: I have some examination of this witness, although it wouldn't be proper cross-examination.

The Court: I beg your pardon?

Mr. Tugman: I have some examination of the witness, although it wouldn't be proper cross-examination.

there would be no objection?

Mr. Loney: No.

The Court: Make him your witness again for some [292] direct examination.

Mr. Tugman: Yes.

The Court: All right, go ahead.

The Clerk: Defendant's Exhibit 16.

Direct Examination

By Mr. Tugman:

Q. Showing you Defendant's Identification 16, will you please identify this object?

A. This is a 60 millimeter mortar round.

The Court: What is that? A 60 millimeter mortar shell?

A. Yes, sir.

Q. (By Mr. Tugman): Where did you first see that mortar shell, Sergeant?

Mr. Loney: Excuse me, your Honor, I would like to object at this time to any testimony con-

(Testimony of Russell W. McCammon.)

cerning this mortar shell. In the first place, I don't think it is proper surrebuttal; in the second place, I don't think it has any materiality in this case.

The Court: You are not opening up a new issue on surrebuttal here, are you, counsel?

Mr. Tugman: If your Honor please, I concede the validity of that point, but I did not learn about the information that I want testimony to be given about until after my case was closed today. Consequently, I claim it is [293] newly discovered evidence and is competent at this time to be introduced.

The materiality, I seek to show by it that this bomb was in a loaded condition, had explosive in it, was kept by the plaintiff, and has a bearing on the negligence of the plaintiff, which is in issue in this case.

Mr. Loney: I think that was all disclosed yesterday, your Honor. That is the mortar shell that his son brought back to him from Dutch Harbor.

The Court: Oh, I see.

Mr. Loney: I don't think it has any materiality in this case.

The Court: Well, he may testify about it. That is a mortar shell, isn't it?

A. Yes.

The Court: Has a live cap in it?

A. Yes, sir.

The Court: Got any other explosive in it?

A. Yes, sir, it has.

The Court: All right, go ahead.

Q. (By Mr. Tugman): Did you disarm that

(Testimony of Russell W. McCammon.)

shell this morning? A. No, I didn't.

Q. Did you disarm that shell?

A. I just took the cap.

Mr. Loney: Wait. Did you take the cap [294] out? A. No, I just took the base of it out.

Mr. Loney: You didn't take it out?

A. You gave it to me. Naturally, I didn't take it out.

Q. (By Mr. Tugman): Do you have the cap?

A. Yes, I have it.

Q. Do you have the cap with you?

A. Yes.

Mr. Tugman: This is Identification 16-A.

The Court: All right. I thought we were going to end this case instead of starting out all over.

Mr. Loney: I make the same objection, I don't think that is material. I hate to be put on the spot of having to meet it.

The Court: On the basis you know about it, I will let him go on.

Mr. Tugman: If the Court please, I am not trying to unduly prolong the proceedings, but this bomb was brought up yesterday, it was in court. If the bomb had been here, I would have gone through this yesterday, but I didn't learn until today that the Sergeant, as I understand it, deactivated or took it apart this morning and there was explosive material in it.

The Court: All right.

Mr. Loney: I would like the record to show that

(Testimony of Russell W. McCammon.)

I don't think counsel's statements will be verified by the [295] evidence.

The Court: You got the Exhibit 16-A, then?

The Clerk: Yes, your Honor.

Q. (By Mr. Tugman): Sergeant, when you took that missile apart, did you find any explosive material in it? A. Yes, sir.

Q. What quantity of explosive material did you find?

A. Well, I couldn't say, it is all around the edges or the walls of the projectile.

Q. Is there any way that that could have been detonated? A. No, sir, the fuse is inert.

Q. Is there a percussion cap in there or something that could have caused damage?

A. In the fuse?

Q. Yes? A. No, sir.

Q. Up in the nose of it here (indicating)?

A. No, that has been taken out.

Q. Was that there when you examined it this morning? A. No, sir.

Q. Is there any way that that could have caused any damage at all?

A. You mean in its present state?

Q. Yes, in the state before you took it apart?

A. No, other than this here (indicating). [296]

Q. What damage could that cause?

A. Well, it can cause quite a bit of damage. Enough power to blind a man or even take off a finger.

(Testimony of Russell W. McCammon.)

Q. What type of a blow, what type of action, would it take to set that off?

A. Not very much. That is heat sensitive, that explosive in this cap is very sensitive to heat, shock or friction. Maybe I can better explain it, the weight in this mortar round here going into a tube at various angles will detonate this. That is about the best way, I couldn't give you the drop test on it or anything like that. But this little cap here sets off a powder train which ignites increments which furnish the projection power for this round.

The Court: You drop those in a tube, don't you?

A. Slide it in a tube and its own weight detonates it.

Q. (By Mr. Tugman): Could that percussion cap ignite the explosive material which is inside the mortar?

A. No, sir, just the increments.

Q. In your opinion, Sergeant, is that a safe object to keep around? A. Not——

Mr. Loney: I am going to object to that, your Honor.

The Court: Well, he may answer.

A. No. [297]

Mr. Tugman: I have no further questions.

The Court: Cross-examination?

Mr. Tugman: Oh, pardon me, I will offer these in evidence.

The Court: All right, they may be admitted, 16 and 16-A.

(Testimony of Russell W. McCammon.)

(Whereupon, the said objects were admitted in evidence as Defendant's Exhibits 16 and 16-A.)

Mr. Loney: May the record show my objection?

The Court: They may be safely kept here apart that way by the Clerk, Sergeant?

A. I would keep this apart.

The Court: I mean if they are kept apart to keep them in evidence?

A. Yes. Of course, if somebody dropped something on it.

Cross-Examination

By Mr. Loney:

Q. Sergeant, this object (indicating), you did not remove this object, did you, this morning?

A. No, sir.

Q. I gave that to you, didn't I? [298]

A. Yes.

Q. And this is not dangerous to be kept?

A. Yes, there is explosive in there.

Q. Is there any way that that could be set off?

A. Yes, there is several ways it can be set off. Suppose somebody took it apart and dropped a match in it.

Q. Well, for the purposes of illustration to the Court, you are talking about the material that hangs on the sides of the wall there?

A. That's right.

Q. Cylinder wall.

(Testimony of Russell W. McCammon.)

The Court: Is that just a residue of the original contents?

A. Yes.

The Court: Most of it has been taken out, but some still adheres to the inside of the walls.

A. Am I at liberty to tell them how that is filled?

Mr. Dickey: Yes.

A. That is cast T.N.T. and that hasn't been soaked out, it looks like it has been chipped out. I mean, T.N.T. being very stable, I have seen, even without using a berilium tool, that is, a non-sparking tool, I have seen fellows do it. However, any spark or friction could ignite that.

Q. But as long as it was kept shut like that, it is [299] perfectly harmless, is it not?

A. Relatively so, yes.

The Court: Well, I think 16-A, that cap, should be withdrawn from evidence here because it is something that is possible to detonate if somebody drops something heavy on it.

The Clerk: We would have to send it up to the Circuit Court if it is appealed, and I wonder how it would be safe to do that.

Mr. Loney: I think so, too. I don't see the materiality of having any of this in evidence, the objects themselves. The powder from this nose part has been removed and that cap is like having a shotgun shell in evidence.

Q. Is that right? A. Yes.

Mr. Loney: If you had a shotgun shell, you wouldn't have a shotgun shell in evidence.

(Testimony of Russell W. McCammon.)

The Court: Well, I think that they have been fairly well described. That is a standard mortar shell. How would you describe it, Sergeant?

A. That is a 60 millimeter H.E. mortar round.

The Court: And that is standard ammunition, I suppose, isn't it?

A. Yes, it is. It is fused with 52 point detonating fuse. [300]

The Court: I think after the case is concluded, they should be withdrawn, because if the case is appealed, we don't want to have to send explosives to the Court of Appeals. I have been reversed by them several times, but I haven't quite got that mad at them.

Mr. Tugman: I think as long as a description of the object is there, I think that is sufficient.

The Court: Yes, I think that is sufficient.

Mr. Loney: It may be withdrawn, then, is that correct, your Honor?

The Court: Yes.

Mr. Loney: You may keep the cap, then.

The Witness: Thank you.

Q. You are not sure that hasn't been exploded?

A. Yes, sir, I am.

Q. You are sure?

A. If that was exploded, this wouldn't be here (indicating).

Q. I thought when you looked at it this morning, you weren't sure.

A. Well, here, I was looking (indicating). There

(Testimony of Russell W. McCammon.)

is a powder train that goes up to here which ignites the other fuse. It has been taken off, but your cap hasn't been exploded.

Q. Oh, I see. [301]

Mr. Loney: That is all.

Mr. Tugman: I have no further questions.

The Court: Did you have other witnesses? You wanted to call Captain Smith, I believe.

Mr. Loney: I will call Captain Smith.

E. B. SMITH

having previously been sworn, recalled in rebuttal on behalf of the plaintiffs, and testified further as follows:

Direct Examination

By Mr. Loney:

Q. Captain, the question I asked Mr. Dickey back there a minute ago, assuming that these objects were found scattered over an area of about three or four acres in extent, would that be consistent had they been dropped from a bomber?

A. I would say that if they were released as a salvo.

Q. Yes.

A. Either accidentally or deliberately, that the dispersal over a three acre area would not be unreasonable.

Mr. Loney: That is all the questions I have.

The Court: Do you have any questions?

Mr. Tugman: No questions.

(Testimony of E. B. Smith.)

The Court: That is all, then, Captain, thank you.

A. Thank you, sir. [302]

(Witness Excused.)

Mr. Loney: That is all, your Honor.

The Court: Are you ready to proceed with the argument, then?

Mr. Loney: Yes, your Honor.

Mr. Tugman: Yes, your Honor.

The Court: All right.

Mr. Tugman: If the Court please, I would like to renew my motions at this time.

The Court: Yes.

Mr. Tugman: But I assume that your Honor would prefer that I argue in conjunction with my closing statement, or would you rather I argued the motions now?

The Court: No, I think that they should be argued along with the argument on the merits, because they involve, at least in large part, the same issues of law that are involved in the merits.

Mr. Tugman: Then, I assume your Honor would withhold the decision?

The Court: Yes. You may renew the motions now and the record will show they have been renewed at the conclusion of all the evidence and the Court will reserve ruling until after the argument. You can conclude your argument on them if it is any different than your argument on the [303] merits.

Mr. Tugman: I see.

(Whereupon, Mr. Loney made an opening argument to the Court, during which the following proceeds are excerpts therefrom):

Mr. Loney: I would like to at this stage move that my pleadings be amended to conform to the proof. My pleadings allege the Navy dropped them there and we believed up until the testimony at this trial that the Navy did drop them, and it seems to me the evidence is consistent that the Navy did drop them, but if the Court does find it was the Army, we would like that right to have the pleadings amended.

Mr. Loney: We forgot to stipulate as to Mr. Coffey's life expectancy.

Mr. Tugman: I agreed with you yesterday about that.

Mr. Loney: The age is 23.65 life expectancy, your Honor.

Mr. Tugman: That is agreeable.

(Following plaintiff's opening argument, the following proceedings were had):

Mr. Tugman: If the Court please, first, I would like to object to any amendment of the complaint, object to the plaintiff's motion here. I would like to register at [304] this time my objection to amending the complaint.

The Court: Oh. Well, the very liberal rules are applied in that respect. We place the emphasis on the proof in modern trials, rather than on the pleadings.

I think since the evidence came in without objection, that the pleadings should be amended to conform with the proof, and that will be the Court's ruling.

(Following the conclusion of argument, the Court rendered the following oral decision):

Decision of Court

The Court: Lawsuits must be decided, as far as the factual issues are concerned, on probabilities, and the proof may be made either by direct or circumstantial evidence. Here, I think, as Mr. Loney has pointed out, the reasonable inference, and I think the only reasonable inference that could be drawn here from this evidence, which I shall not detail, is that these objects that were found in the gulley between the Livengood and the Wagner place, in the general area where this bomb which caused plaintiff's injury was, got there by being dropped from a plane and, without question, they are 13 pound practice bombs which are used only for military purposes by military departments, the Navy and the Air Corps and the Army. Of course, it is [305] possible that those objects may have been brought there, dropped by a hunter who found them too heavy to carry, but it isn't likely that they would have been imbedded three or four inches in the ground, all on the blunt end, as Mr. McKnight in his deposition said that he found these objects in that general area.

Having established that they came from a plane,

that they were military property, and in all probability they were dropped from a military plane, then, of course, we have the matter of establishing negligence, and I think the doctrine of *res ipsa loquitur* applies, because the government would have exclusive control of the bombs and the plane in which they were carried, and the bombs could not get there where they were on private property in a private field, away from any military area or bombing range, without negligence of some sort on the part of the operator of the plane. And I don't think it is necessary for the plaintiff here to show it was Pilot Smith or Pilot Jones or he was from the Navy or the Army or Air Corps. It is sufficient, I think, to show that it must have been under circumstances due to the negligence of some agent and employee of the government in one of the services, some pilot or bombardier, or both, that caused them to be dropped in that particular place, and I think it is a matter of common sense, as well as of law, that dropping and leaving objects of this kind [306] containing explosives in dangerous quantity is negligence.

Now, it is a rather puzzling thing how these practice bombs got there. I think that Captain Smith is a credible witness and I credit his testimony, and I can't believe, in view of that testimony, that these objects were dropped there by the Naval pilots or Naval dive bombers, because they are not the type that is used in dive bombing, and his testimony is that they weren't used in that area. But there is testimony here—of course, the Court will take judicial notice of it in the absence of it—that there were

other operations here, that the Army had a base, I don't know what it was called then, but it is now Larson Field near Moses Lake. They had a target area on Saddle Mountain. And the evidence here is that they were using level bombing, they were engaging in level bombing practice in which they would use this type of bomb, and if they began their runs as far south as the Yakima River in approaching this area on Saddle Mountain—I am not inclined to speculate and I don't think it necessary for me to pin point the service that might be responsible here—but for what it may be worth, my guess is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley and one salvo hit down there and one of them didn't explode. That, it seems to me, is a natural and logical thing to suppose that they [307] were dropped from a higher altitude than dive bombers would operate.

It isn't any great mystery that one of them didn't explode, because it is a matter of common knowledge that there are dud shells, both in artillery operation and bombing operation, as one witness testified here, because of the human equation. There are bound to be some imperfections in some of the most carefully manufactured ammunition.

Now, the much more difficult question, I think, much more difficult issue than that of deciding whether or not there is primary negligence established here on the part of the government, is that of determining whether or not there is contributory negligence that would prevent recovery. I think

that is much closer than the question of negligence. I think there is definitely a distinction here between this case, for obvious reasons, and the cases cited by government counsel where youngsters go on a military reservation or go on an artillery range and get into trouble there with unexploded ammunition, or where a person goes upon a military reservation, a trespasser, and carries away ammunition. Here these people had permission to hunt upon these premises. It is true that technically, perhaps, they didn't have any right to carry away things that they found there, but, obviously, these objects were abandoned [308] pieces of metal that were not used by the occupant of the land, and I don't think that the fact that they carried them off would be taken as a basis of denying recovery to the plaintiff here. I don't think there is any great difference, as I remarked during the argument, between this situation here and what it would have been if the plaintiff had found this metal and had tried to scrape the dirt off or to clean it in the place where it was found.

Now, contributory negligence, as primary negligence, is negligence under the particular and peculiar circumstances that are presented in the case at hand. What may be negligence in one situation would not be in another. If a person picked up an object such as this on a place that he knew to be a bombing range, of course, that would be negligence, if he treated this object the way the plaintiff did here. But people are not supposed to find heavy chunks of lead with explosives in them in a farm-

er's field miles away from any bombing range or a place where they would likely be found, and the standard that I have to apply here is what would the person of average, ordinary caution and discretion do? What would the ordinarily prudent man do or most likely do in this situation? And by that standard, I don't think I can say that the plaintiff was contributorily negligent.

The way in which this object was found, dirt in [309] the ends, there was no pin visible. It wouldn't be visible unless he scraped out more of the dirt than he did. There weren't any markings visible on it that it was a bomb. I am far from being an ordnance expert, but I am a veteran of two wars, I have seen a great many bombs of all sizes and descriptions on the ground as duds and in military dumps, and I have never seen anything like this. Of course, you wouldn't ordinarily in wartime see a practice bomb, I suppose, but if I had seen this lying in the field, I would have had no idea what it was. I would have been inclined to think it was some kind of a sounding lead or heavy sinker or something that was used for connecting cable, cable joint, or something of that sort. I wouldn't have been inclined to think that it carried concealed explosives.

So that I am obliged to find, I think, that there wasn't contributory negligence.

For the purpose of the findings, I think that I should find all of your claimed grounds of negligence here, Mr. Loney, but I think the dropping of the explosives, in the first place, off of a military

area and failing to mark them plainly, I think would be acts of negligence that would support recovery.

I might say also that another thing which the people that handle this ammunition knew or, in the exercise of ordinary caution, should have known, was that when those [310] practice bombs are dropped, that the one characteristic that in my judgment, would distinguish them as bombs, the tail fins, would readily become detached and in almost every instance would become detached when they are dropped from an altitude. I think one of the witnesses here, the Warrant Officer, testified that even dropping them from a second story platform would serve to detach the fins, and with the fins detached they look, as can be seen here, very much like a heavy piece of lead with a hole in the middle.

Now, the matter of amount of recovery is always a difficult one for me. I can sympathize with juries when I have that problem, and I do have it, of course, in these cases because jury trial is not permitted in a tort claims action against the United States.

Of course, it is obvious that the plaintiff has suffered a permanent physical injury and disability in the loss of his thumb. However, I don't believe that there has been shown here any direct pecuniary loss in his profession as a pharmacist. He has continued on, apparently, on the basis of at least 34 hours a week and has actually been given a raise in salary since this happened. It does result in disability and

pecuniary loss so far as his work as a farmer and sheep raiser is concerned, but as I remarked here, I think during the trial, we have to remember that I can't properly allow anything for the loss of his profits [311] because he hasn't lost his managerial ability; it is only his ability to do physical work to some extent that is involved. And I think these cases, care should be exercised to keep them, as the law provides, on a compensatory basis strictly, and that is what I shall endeavor to do here.

I think that, all things considered, an \$8,500.00 award would be adequate and reasonable, and, in addition to that, the out-of-pocket expenses of the plaintiff, which I believe consisted only of the doctor bill in this case, and costs, and the findings may be prepared and presented on that basis.

Court will adjourn now.

(Whereupon, the trial of the instant cause was concluded.) [312]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America

Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, called for in Appellant's Designation filed May 5, 1955.

Complaint.

Summons with Marshal's return.

Motion for Summary Judgment.

Stipulation to dismiss Motion for Summary Judgment.

Order dismissing Motion for Summary Judgment.

Answer and Affirmative Defense.

Defendant's praecipe for witness.

Plaintiff's praecipe for witnesses.

Court Reporter's record of proceedings at trial.

Exhibits No. 3, 4, 5, 6, 7, 8, 13 and 15.

(Exhibits No. 1, 2, 9, 10, 11, 12, 12A and 12C under separate cover.)

Findings of Fact and Conclusions of Law.

Judgment.

Cost Bill.

Stipulation to Amend Judgment.

Order amending Judgment.

Order denying motion for New Trial.

Notice of Appeal.

Designation of Record on Appeal.

Order extending time for filing record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 20th day of July, 1955.

STANLEY D. TAYLOR,

Clerk of said Court,

[Seal] By /s/ THOMAS GRANGER,

Deputy.

[Endorsed]: No. 14836. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Elmer G. Coffey and Mrs. Elmer G. Coffey, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed July 22, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14836

UNITED STATES OF AMERICA,

Appellant,

vs.

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, husband and wife,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant, United States of America, intends to rely upon the following points on appeal of the above-entitled cause:

1. The evidence is insufficient to support the District Court's findings of fact, conclusions as to negligence, and judgment. Plaintiffs failed to meet their burden of proof, and the District Court erred in not granting the Government's motions to dismiss made at the conclusion of plaintiffs' affirmative case and at the conclusion of all the testimony.

2. The District Court erred in admitting evidence concerning the finding of bombs other than the one which caused plaintiff's injury.

3. The District Court erred in holding that there was negligence of the Government which was the proximate cause of plaintiff's injury, and in failing

to hold that the conduct of the plaintiff E. G. Coffey and of the Osborns was the efficient intervening cause of the accident.

4. The District Court erred in applying the doctrine of *res ipsa loquitur*.

5. The District Court erred in holding that the United States is liable under the Federal Tort Claims Act (a) for failure to mark practice bombs concerning their dangerous qualities; (b) for failure to post warnings concerning dangerous objects on property not owned or controlled by it; and (c) for the manner in which it constructs practice bombs.

6. The District Court's findings relating to negligence and the absence of contributory negligence are clearly erroneous.

7. The District Court erred in granting judgment for the plaintiff.

/s/ WILLIAM B. BANTZ,
United States Attorney;

By /s/ LESTER S. JAYSON,
Attorney, Department of Justice, Attorneys for
United States of America, Appellant.

[Endorsed]: Filed July 22, 1955.

No. 14836

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ELMER G. COFFEY AND MRS. ELMER G. COFFEY, HUSBAND
AND WIFE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION

BRIEF FOR THE UNITED STATES

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WILLIAM B. BANTZ,
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FILED

DEC - 2 1955

PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 14836

UNITED STATES OF AMERICA, APPELLANT

v.

ELMER G. COFFEY AND MRS. ELMER G. COFFEY, HUSBAND
AND WIFE, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal by the United States from a judgment of the United States District Court for the Eastern District of Washington, Southern Division, imposing liability on the Government under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), 2671 *et seq.* Appellee Elmer G. Coffey sustained injuries to his left hand when a metal object he was hammering exploded. The object had been found on private property in a rough area by two hunters more than a year before; they picked it up, carried it to appellee's home and gave it to him. After the accident the object was identified as a practice bomb signal, loaded with a blank shotgun shell, normally used by United States

military forces. Appellee's complaint, filed June 17, 1954, asserted that his injuries were caused "solely" by negligence of the Department of the Navy (R. 7-8). The Government's answer denied any act of negligence on the part of the United States and affirmatively alleged that appellee was himself guilty of negligence (R. 9-10).

The case went to trial in February 1955 before District Judge Sam M. Driver. There was no direct evidence at trial as to how the bombs came to the spot where they were found, and, in an oral opinion (R. 229-235) rendered after trial, the district judge stated, "[I]t is a rather puzzling thing how these practice bombs got there. * * * [B]ut for what it may be worth, my *guess* is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley * * * " (R. 230-231; emphasis added). In his Findings of Fact and Conclusions of Law (R. 10-15), this "guess" was transposed into a factual finding that at some time prior to 1951 the object had been dropped from some military aircraft. The finding that appellee's injuries were caused by employees of the United States is based upon the further assumption or inference that whatever aircraft dropped the object was operated by military personnel, and upon the additional assumption or inference that such personnel were acting within the scope of their employment at that time, and upon the further inference that they were acting negligently.

Judgment awarding damages to appellee in the sum of \$8,740.60, plus interest and costs, was entered March

4, 1955 (R. 16).¹ A notice of appeal was filed May 2, 1955 (R. 18). This Court's jurisdiction rests on 28 U. S. C. 1291.

1. *The proceedings before the district court.*—The evidence introduced by both parties at trial may be summarized as follows:

a. *Events leading up to the accident.*—In 1950 Elmer G. Coffey, a 47-year-old sheep farmer and part time pharmacist, moved from Seattle to a farm located about 4½ miles west of Benton City, Washington (R. 54–5). About a mile from the Coffey sheep farm was another farm known as the Waggoner Ranch. Adjoining the Waggoner Ranch, and separated from it by a gulley, was the Livengood Ranch (R. 11). While some farming was done there, the area near the gulley was rough, rocky, and hilly terrain (R. 23).

In the fall of 1951, Oliver Osborne and Albert J. Osborne, brothers-in-law of Coffey and then guests at his home, went bird hunting in that area (R. 22–3). While walking in the gulley, at a point some 50 to 75 feet from a county road, and approximately 1½ to 2 miles from Coffey's farm, they discovered two metal objects partially covered with dirt (R. 22–4, 38–41). The objects, cylindrical in shape and each about 8 inches long and 2 to 3 inches in diameter (R. 12), were heavy and seemed to resemble pieces of lead conduit pipe (R. 39, 43–4).

¹ As originally entered, the judgment directed interest at the rate of six per cent per annum. This was contrary to the provisions of the Tort Claims Act which specifically limit interest to four percent. 28 U. S. C. 2411 (b). On April 5, 1955, an order was entered amending the judgment by changing the interest rate to four per cent (R. 17).

There appeared to be a hole or indentation at the end of each which was filled with dirt or corrosion (R. 47, 44-5). The Osbornes did not examine the objects closely, but did scratch their surface to see if they were lead (R. 23, 43). On determining that the metal was lead, they decided to take it home and give it to Coffey because they knew that he made use of lead in connection with his hobby of pouring and molding bullets (R. 23, 39).

The Osbornes testified that they knew they were on private property; in fact, the area from which they took the metal objects was enclosed by a fence, but they said they had received permission from the owners of the property to hunt on the ranches (R. 34-35, 53). No evidence was offered, however, that either Oliver Osborne or his brother Albert had ever been given permission to disturb anything which might be on the property or to remove and carry anything away from the premises.

Albert Osborne testified that he had worked in the locality during some of the years between 1942 and 1948, and that he knew that the Navy had used some of the general area for bombing ranges at that time. He was aware also that the Navy had posted "Keep Off" signs near the ranges. (R. 47-8, 52.) But he denied seeing any warnings about bombs during the years 1950-1952 (R. 48), and he testified that there were no signs in the area where these particular bombs were found (R. 24, 52). The Osbornes saw no fins on the objects, nor did they see any metal nearby to indicate any fin, so they did not recognize the objects to be bombs (R. 24-25), although in broad form they were similar to a bomb or

dud which they knew appellee Coffey kept in his home (R. 49). When found, the objects were 5 or 6 feet apart and there were no other like metal objects nearby (R. 33-4).

The Osbornes carried the objects to appellee's home and gave them to him. He "took it and threw it in the basement" (R. 55).

Appellee Coffey testified that his hobby was guns and the making of bullets, that he had handled firearms all of his life, and that he even kept a collection of live bullets (R. 145, 147). He also kept a 60 millimeter mortar shell in his home which still had enough explosive in it to cause considerable damage (R. 218-226). Appellee testified that on February 14, 1953—more than a year after the Osbornes had presented him with the objects (R. 12)—Emmet N. Frederick came to his home to visit him and to learn how to cast some bullets. They began casting with lead, but shortly decided to try some "higher velocity stuff." Appellee went down into his basement and brought out one of the objects the Osbornes had given him. He had examined it two or three times before and had decided that it was composition lead, harder than usual (R. 133, 94). It was encrusted with dirt and pebbles (R. 135). He testified that he was not familiar with bombs and did not believe the object was explosive or dangerous (R. 136). While he later heard that there had been warnings publicized about the possibility of bombs in the area, he never heard about it before the accident, and he denied even knowing that there had been a bombing range in the area (R. 148-9). He showed the object to Frederick, but

told him that it was dirty and would have to be cleaned off before putting it into the melting pot, saying that otherwise "you will have a small explosion" (R. 133-4).

Appellee began beating the object first with an iron pipe and then with a hammer (R. 94, 134-5). He threw it down and beat it for two or three minutes to knock the crust and dirt off the sides (R. 141). Then, seeing what appeared to be a hole going through the entire cylinder, he took a pin or punch and drove it into the hole about three inches, striking four "good and hard" blows with his hammer, when it exploded (R. 134-5, 141).²

b. *The nature of the bomb and its use by the military.* The objects which the Osbornes had found and had given to appellee were identified by ordnance specialists as parts of two 13 pound Mark A & N practice bombs (R. 63, 157). They are made of a soft zinc-alloy composition (R. 163) and are loaded with a cartridge resembling a blank shotgun shell, containing a black or colored powder. Their purpose is to create a spot, on landing, which can be observed and photographed from the air so as to check the effectiveness of the target practice (R. 164-5). They will not detonate under casual handling, as when

² Appellee sustained the loss of his left thumb, some permanent disability to his left index finger, and some related injuries to his left hand as set forth in Finding VI (R. 12). The district judge found that the injuries did not result in any direct pecuniary loss in his profession as a pharmacist, but that there would be pecuniary loss so far as his physical work as a farmer and sheep raiser is concerned, although not with regard to his managerial ability (R. 234-5).

dropped from 4 or 5 feet; they require an external force to set them off, thus, by pounding it or by dropping it from a plane (R. 165). The bombs have a thin metal tail fin molded on, which almost always tears off when the bomb is dropped from an altitude (R. 176).

While available to both the Army and the Navy for practice bombing from aircraft, this type of bomb is used only in horizontal bomb practice; when the bomb is dropped, the plane must be in horizontal flight and at a high altitude, *i. e.*, at about 6,000 feet (R. 157, 162). The bomb cannot be used in skip bombing or in dive bombing because, if it were, it would not explode. The bomb will detonate only when it lands on its nose, and that will not happen unless it is dropped from horizontal flight (R. 158). In skip and dive bombing, on the other hand, the plane itself is aimed at the target, and comes in at a sharp angle (R. 191). An entirely different type of bomb is used for dive bombing (R. 208-9).

During World War II years, the Navy had an air station in the area, known as the Pasco Naval Air Station. It was used for training aircraft carrier flyers. A practice bombing range was established in Benton County, located about ten miles from the place where the Osbornes found the two bombs (R. 188-190, 57). The bombing area was enclosed by barbed wire fencing and warning signs were posted at intervals of about 200 feet. At the time of the accident these signs were still there (R. 200). This Naval bombing range was used *only* for dive bombing and

skip bombing (R. 58-9, 191-2). Applicable Naval Regulations specifically designated the range for that purpose alone (R. 198). Planes with bombs hanging on a bomb rack were not permitted to fly over populous areas (R. 194), and the Regulations prohibited the dropping of ordnance anywhere except in designated and approved areas (R. 198). No violation of this regulation was ever reported to Naval authorities (R. 199). The 13 pound practice bomb, such as the Osbornes found, was never used at the Naval Air Station at all (R. 192), nor was that type of bomb ever seen there (R. 205). For its dive and skip bombing practice, the Navy used a miniature bomb, smaller than the one with which appellee injured himself (R. 192). Such miniature bombs are made of cast iron and are not as smooth as the other (R. 208-209). None of the military services other than the Navy used the Benton County target area (R. 194-5). It is to be noted, moreover, that the runways at the Naval Air Station were only long enough for aircraft carrier type of planes and were too short to be used by bomber type aircraft (R. 193-4).

There was, however, an Army target area located north of Saddle Mountain, not in Benton County, which was used for horizontal bombing by the Army Air Force (R. 57-8, 195-6). This bombing range is located about 55 air miles from Benton City.³ By agreement between the two services, the Navy confined its flight operations in the general area of Benton

³ We are advised by the Department of the Army that the Army target range is located in Yakima and Kittitas Counties, approximately 55 miles northwest of Benton City.

County to under 6,000 feet, while the Army flew at altitudes above 6,000 feet (R. 195).

In more recent times, it was common knowledge in the Benton City community that bomb fragments could be found on the old Naval bombing range. James D. Dixon, a friend of appellee, testified that when he came to live nearby he was interested in getting lead and was told by friends to search around the range area; he did, and he found some bombs which he asserted were similar to the one which appellee detonated (R. 89-90, 87). He stated that many people go out into the old range and take bombs or pieces of bombs home, and that he had done so himself (R. 91-2). Floyd McKnight, who had rented part of the Livengood ranch to pasture his cattle and who also worked at the Waggoner ranch, testified that within an area of some 3 acres on the Livengood property he, from time to time, found what he estimated to be a total of 12 or 15 bombs almost all of which were in a broken or shattered condition (R. 102-4). He indicated their weight to be about five pounds each (R. 109). He did not believe them to be dangerous, and even sawed one in half with a hacksaw (R. 111). When he learned they were bombs, however, he buried them. But, at appellee's request, he later dug up some of the fragments and gave them to him. (R. 115-6, 121-2). These fragments (Plaintiff's Exhibits 2, 9, 10, and 11), were identified at trial as parts of the same type of bomb as the Osbornes had found (R. 67-71). An ordnance specialist, examining the smaller pieces (Pl. Exs. 9, 10, and 11), stated his opinion to be that

if they were found together within a 25 foot radius the bomb from which they came either had been dropped (and presumably shattered) there or had exploded there (R. 68-71). As to one of the larger parts of a bomb found by McKnight (Pl. Ex. 2), it was his opinion it had been dropped there from a considerable height (R. 68). But a second specialist suggested otherwise (R. 185-6). Another witness stated that if these objects were found scattered within an area of 3 or 4 acres, it would be consistent with their having been released from a bomber, either accidentally or deliberately (R. 226).

However, as to the particular bombs found by the Osbornes, the testimony was quite different. When one of them (Pl. Ex. 1) was examined by the ordnance specialist, he testified that he could not say whether that one had been dropped from an airplane; indeed, he could not even say that it had been dropped from a considerable height (R. 65, 64). Asked to explain certain marks on the object, he said they could have resulted either from having been dropped or from having been dragged across the ground (R. 65).

2. *The Government's motions to dismiss, and the proceedings at the close of trial.*

a. *The Government's motions to dismiss.*—At the conclusion of appellee's affirmative case the Government moved to dismiss, contending *inter alia* that the appellee had failed to establish any negligence upon the part of the Government and that the doctrine of *res ipsa loquitur* is not applicable in this situation (R. 151-4). The trial judge agreed that

appellee had failed to show negligence directly, stating to Government counsel (R. 152-3; emphasis added):

I will concede that they haven't shown directly any negligence; they haven't proved that Pilot X got out of the area and dropped a bomb. It would only be by res ipsa loquitur that they could establish their case, so you needn't dwell on the question of direct negligence. There hasn't been any proof of it.

The judge, however, indicated he would not hear argument on the legal question then, preferring to have the Government put in its evidence. Accordingly, he denied the motion (R. 154).

At the conclusion of the trial, the Government's motion to dismiss was renewed (R. 227). But again it was denied (R. 229-235).

b. *Appellee's motion to amend the pleadings.*—After the taking of evidence was closed, and during the course of counsels' final arguments, appellee's counsel moved to amend his pleadings so as "to conform to the proof" (R. 228). The complaint had alleged that the asserted negligence was "solely" of employees of the Department of the Navy (R. 8). Appellee's motion after trial sought to include the Army within this allegation (R. 228). The Government opposed the motion, but the Court granted it (R. 228-9).

c. *The oral opinion and the findings of fact and conclusions of law.*—In his oral opinion rendered after trial, the district judge stated that "it is a rather puzzling thing how these practice bombs got there" (R. 230) and that, while it was possible that

the objects may have been brought to the gulley, or dropped by a hunter who found them too heavy to carry, "the only reasonable inference * * * is that [they] * * * got there by being dropped from a plane" (R. 229). Having thus determined (by inference) that they had been dropped from a plane, the judge then inferred the identity of the plane, stating, "in all probability they were dropped from a military plane" (R. 230). Then, specifically giving credence to the testimony that the Navy did not use this type of bomb in the area, he found that the bombs were not dropped by Naval pilots (R. 230). He noted, however, that there was testimony of an Army target range near Saddle Mountain for horizontal flight bombing. From this he inferred that the Army was in fact using this type of bomb, and went on to say that (R. 231; emphasis added):

* * * *if* they [the Army planes] began their runs as far south as the Yakima River in approaching this area on Saddle Mountain—I am not inclined to speculate and I don't think it necessary for me to pin point the service that might be responsible here—but for what it may be worth, my *guess* is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley and one salvo hit down there and one of them didn't explode.

As to negligence, the trial judge held that since the Government had exclusive control of the bombs and of the plane in which they were carried, the doctrine of *res ipsa loquitur* applies—"the bombs could not get * * * on private property in a private field, away

from any military area or bombing range, without negligence of some sort on the part of the operator of the plane" (R. 230).

The trial judge stated that the issue of contributory negligence was a "much closer" and "much more difficult question" (R. 232, 231), but he concluded that none was present (R. 233). As to the Osbornes' taking the bombs off private property, the trial judge stated that while perhaps they had no right to do so, the objects were abandoned property (R. 232).

In his Findings of Fact, the trial judge specified that the United States military personnel had been negligent (a) in failing to mark the practice bombs with signs to warn persons of their dangerous qualities; (b) in dropping a bomb which was so constructed that its fin would readily become detached, so that it would then appear harmless and not look like a bomb; and (c) in dropping the bomb in an area outside an authorized practice range (R. 13-4). He found also that the negligence occurred while such military personnel were acting within the scope of their authority and in the line of active duty (R. 14).

Judgment against the United States in the total amount of \$8,740.60 plus interest and costs was entered March 4, 1955 (R. 16). This appeal followed.

STATUTE INVOLVED

1. The relevant provisions of the Federal Tort Claims Act⁴ are as follows:

⁴The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judi-

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

SPECIFICATION OF ERRORS

1. The evidence is insufficient to support the District Court's findings of fact, conclusions as to negligence, and judgment. Plaintiffs failed to meet their burden of proof, and the District Court erred in not granting the Government's motions to dismiss made

cial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992).

at the conclusion of plaintiffs' affirmative case and at the conclusion of all the testimony.

2. The District Court erred in admitting evidence concerning the finding of bombs other than the one which caused plaintiff's injury.

3. The District Court erred in holding that there was negligence of the Government which was the proximate cause of plaintiff's injury, and in failing to hold that the conduct of the plaintiff E. G. Coffey and of the Osbornes was the efficient intervening cause of the accident.

4. The District Court erred in applying the doctrine of *res ipsa loquitur*.

5. The District Court erred in holding that the United States is liable under the Federal Tort Claims Act (a) for failure to mark practice bombs concerning their dangerous qualities; (b) for failure to post warnings concerning dangerous objects on property not owned or controlled by it; and (c) for the manner in which it constructs practice bombs.

6. The District Court's findings relating to negligence and the absence of contributory negligence are clearly erroneous.

7. The District Court erred in granting judgment for the plaintiff.

ARGUMENT

I

The Appellee failed to establish the factual elements which are conditions precedent to recovery under the Tort Claims Act

A. The District Court's findings that the bombs were placed on private property by Federal employees, that these Federal employees were acting within the scope of their employment, and that they were acting negligently, are based entirely upon conjecture and a pyramiding of inference on inference

1. Congress did not, through the Tort Claims Act, undertake to insure the safety of the person or property of our citizens. Rather, the overall purpose of the Act was to waive governmental immunity from suit for tort so as to permit those who suffered damage by the wrongful conduct of federal employees to have the same legal remedy against the United States which they would have against a private person in like circumstances. When that remedy is available, the claimant must establish his cause of action in the same manner, subject to the same requirements of sufficiency of proof, as in the case of private litigation. Far from relaxing the normal requirements of legal proof, the statute expressly imposes a number of conditions precedent to the right of recovery and even excludes a wide variety of wrongs from its coverage. See 28 U. S. C. 1346 (b), 2674, 2680.

Section 1346 (b) prescribes the basic conditions under which liability may be imposed. Under that Section, the United States accepted liability for the negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment, under circum-

stances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” As this Court recently observed in *United States v. Dooley*, — F. 2d —, Slip Op. p. 2 (C. A. 9, Oct. 17, 1955), each of the elements stated in Section 1346 (b) is a separate and necessary precondition to the imposition of liability, and there can be no recovery in the absence of specific findings establishing every one of them.

Obviously, the basic precondition to liability is that “* * * [T]he statute requires a negligent act” (*Dalehite v. United States*, 346 U. S. 15, 45). The mere fact that the claimant has been injured by a shell or an explosive which unquestionably is of military origin, will not, of itself, create liability; without proof of a negligent act there can be no recovery. *United States v. Inmon*, 205 F. 2d 681 (C. A. 5) (plaintiff injured by a dynamite cap found on private property which had formerly been an Army base); *Ford v. United States*, 200 F. 2d 272 (C. A. 10) (plaintiff injured by a booby trap on Army property frequented by the public); *Schmidt v. United States*, 179 F. 2d 724 (C. A. 10) (claimants injured by a shell found on a former target range); *Denney v. United States*, 185 F. 2d 108 (C. A. 10) (same); *Rolon v. United States*, 119 F. Supp. 432 (D. P. R.) (plaintiff injured by portion of a shell found abandoned on a public road near an Army base).

Thus, in the instant case, the fact that the bomb with which appellee injured himself was military in origin is not sufficient, standing alone, to warrant re-

covery. As these cases clearly demonstrate, liability cannot be posited on the fact that the instrumentality causing the injury—even though it be an inherently dangerous one—is, or at one time was, *owned* by the Government. For, the fact of ownership does not necessarily connote negligence or wrongful conduct. See in addition to the cases cited above, *Bowden v. United States*, 200 F. 2d 176, 177 (C. A. 4); *In re Texas City Disaster Litigation*, 197 F. 2d 771, 776 (C. A. 5), *aff'd*, 346 U. S. 15, 45; *Curtis v. United States*, 117 F. Supp. 912 (N. D. N. Y.). Nor is it enough for the appellee to show that the United States engaged in bombing practice in or near the locale of his residence, because the Tort Claims Act does not permit recovery on a theory of nuisance, or the conduct of an extra-hazardous activity, or on any other theory of liability without fault. *Dalehite v. United States*, *supra*, 346 U. S. at 44-5; *United States v. Ure*, 225 F. 2d 709, 711 (C. A. 9); *United States v. Inmon*, *supra*, 205 F. 2d at 684; *Heale v. United States*, 207 F. 2d 414 (C. A. 3); *Harris v. United States*, 205 F. 2d 765, 767 (C. A. 10). In short, unless the claimant can establish negligent or wrongful conduct, his suit must fail.

But in addition to establishing negligent conduct, the claimant must also show that the negligent act was that of a federal employee, and the word “employee” is given a specific definition in the statute. 28 U. S. C. 2671. Thus, there can be no recovery, even though negligence is proven, if the actor is not acting in his capacity as an employee of the United States although he actually is employed by the United

States. *Fries v. United States*, 170 F. 2d 726 (C. A. 6) (U. S. employee "loaned" to a local state agency). And, of course, given the status of federal employment plus federal ownership of the instrumentality plus negligence, there still cannot be liability if the negligence occurs while the employee is outside the scope of his employment. *King v. United States*, 178 F. 2d 320 (C. A. 5) (Army pilot negligent while joy riding in Army plane). Finally, despite the presence of negligent conduct of a federal employee while acting within the scope of his employment, there can be no liability unless there is a proximate relationship between that negligence and the injured party. Cf. *Schmidt v. United States*, 179 F. 2d 724 (C. A. 10).

2. The burden of establishing each one of these elements requisite to the imposition of liability under the Tort Claims Act rests, of course, upon the claimant. *United States v. Inmon*, *supra*, 205 F. 2d at 684; *Bowden v. United States*, 200 F. 2d 176, 177 (C. A. 4). His burden is to show that the negligence occurred "at the time *and in respect to the very transaction* out of which the injury arose." *United States v. Eleazer*, 177 F. 2d 914, 916 (C. A. 4), certiorari denied, 339 U. S. 903 (emphasis by the court). And, clearly, his burden is to prove such negligence—as well as the other prerequisites—by something more than mere conjecture, or speculation, or sheer guesswork. *Bowden v. United States*, *supra*. Indeed, the quantum of legal proof necessary to establish an actionable cause against the United States under the Tort Claims Act, is certainly no less than, or different from, that needed to establish liability for negligence on the part

of a private individual. 28 U. S. C. 2674. To permit the claimant to establish his cause on a chain of presumptions or on a series of inferences, such as was successfully accomplished at the trial below, is to impose liability on the basis of conjecture and speculation rather than on legal proof. See *Bowden v. United States*, *supra*, 200 F. 2d at 177; *Rolon v. United States*, 119 F. Supp. 432 (D. P. R.); *Curtis v. United States*, 117 F. Supp. 912, 913 (N. D. N. Y.).

A close analysis of the record made at trial, and of the trial judge's opinion, discloses that the direct proof established but one primary fact, *viz.*, that a Government bomb was found on private property located approximately fifty-five miles from an Army target range where, years before, such bombs were used. From that fact, by the process of pyramiding inference on inference, the trial judge made findings concerning each of the elements necessary to an actionable cause. In this way liability was imposed by crossing from the area of legal proof into the realm of speculation and guesswork.

To reach the conclusion that liability be imposed, the trial judge had to reason as follows (R. 229-231):

a. The objects picked up and taken away by the Osbornes were identified as being bombs of military origin. This fact was established by direct proof.

b. Another person, McKnight, found other bombs somewhere in the general vicinity, imbedded 3 or 4 inches in the ground. From this, it was *inferred* that the McKnight bombs were dropped from a plane, and because the McKnight bombs were dropped from a

plane it was *inferred* that the Osborne bombs also were dropped from a plane.⁵

c. From the inferred fact that the bombs were dropped from some plane, it is further *inferred* that the plane was a U. S. military plane (*i. e.*, owned by the United States, as opposed to other possibilities such as being owned or used by a State National Guard unit).

d. From the inferred fact that it was a military plane, and having ruled out the possibility of its being a Navy plane (R. 230), and because the Army had a target range over fifty miles away at Saddle Mountain, it is assumed or *inferred* that the plane was an Army bomber.

e. From the inferred fact that it was an Army bomber, it is assumed or *inferred* that the Government had exclusive control over the plane and the bombs which it is assumed the plane carried.

f. From the inferred fact that the assumed plane was under exclusive governmental control, it is *inferred*

⁵ But note that appellee's own witness, an ordnance specialist, examining one of the Osborne bombs testified that he could *not* say that that bomb had been dropped from a plane or from any considerable height (R. 65, 64). He suggested that it might have been dragged to the spot where it was found (R. 65). The trial judge himself acknowledged the possibility that they "may have been brought there, dropped by a hunter who found them too heavy to carry" (R. 229), but decided that was not likely because some of the *McKnight* bombs were imbedded. Whether the Osborne bombs had any relationship at all to the *McKnight* bombs, whether they were brought or dropped there at the same time, is also a matter of inference. The Osbornes said they did not see any other bombs or pieces of metal in the area where they picked up the two objects (R. 25, 33).

that the plane was piloted by federal employees, *i. e.*, Army personnel.

g. From the inferred fact that the plane was piloted by Army personnel, it is *inferred* that they were then acting within the scope of employment.⁶

h. By reason of all of the inferred facts, it is then assumed or *inferred* that the bombs could not have gotten where they were found “without negligence of some sort” (R. 230). Or, as the trial judge put it, “for what it may be worth, my *guess* is that some Army bombers didn’t get rid of their practice bombs over the target area and dropped them in this gully * * *” (R. 231, emphasis added).

This series of assumptions—pyramiding inference on inference—is patently short of meeting the minimum standards of legal proof. It is nothing but guess-work. And the trial judge himself virtually acknowledged it to be such. Strangely enough, while the trial judge expressed his inclination not to speculate, at the very same time he proffered his *guess* as to how the bombs came to be where they were found (R. 231). Equally strange—especially in view of his determination that appellee had established his case—is his frank remark in his opinion that “it is a rather puzzling thing how these practice bombs got there” (R. 230). It was appellee’s burden to establish how they got there and to establish negligence in putting

⁶ Even airplanes have been taken or stolen by military personnel for purposes of a joyride, having no relationship whatever to any official military mission or to any mission within the scope of employment. See *King v. United States*, 178 F. 2d 320 (C. A. 5).

them there. If, after all the evidence was in, the trier of the case was still puzzled and unable to perceive, except through guesswork, how the bombs got there, manifestly, appellee failed to meet his burden of proof.

It is an elementary and basic principle that "negligence cannot be established by inference upon inference, or presumption upon presumption. * * * Neither can a finding of negligence rest on mere speculation or conjecture." *Gas Service Co. v. Hunt*, 183 F. 2d 417, 420 (C. A. 10); and see *Bowden v. United States*, 200 F. 2d 176, 177 (C. A. 4); *Abbott v. Railway Express Agency*, 108 F. 2d 671, 672 (C. A. 4); *Rolon v. United States*, 119 F. Supp. 432, 434 (D. P. R.); *Curtis v. United States*, 117 F. Supp. 912, 913 (N. D. N. Y.); 20 Am. Jur., p. 168. The words of the Eighth Circuit in *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 330, are apt (emphasis added):

While circumstantial evidence is competent to prove negligence or the cause of an injury, the circumstances must be such as to take the case out of the realm of mere conjecture. An inference of negligence must be based on a logical relation and connection between the proven facts or circumstances and the conclusion sought to be adduced from them. The circumstances must themselves be proved and cannot be presumed. * * * *A presumption must be based upon facts proven by direct evidence and can not be based upon nor inferred from another presumption.*

The Supreme Court long ago declared the same rule. *United States v. Ross*, 92 U. S. 281, 284; *Manning v.*

Insurance Co., 100 U. S. 693, 698; *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 477. And not only is this the rule in the federal courts but it is also rigidly adhered to in the State of Washington, where the present case arose. *Neel v. Henne*, 30 Wash. 2d 24, 37, 190 P. 2d 775; *Brucker v. Matsen*, 18 Wash. 2d 375, 382, 139 P. 2d 276; *Prentice Etc. Co. v. United Pac. Ins. Co.*, 5 Wash. 2d 144, 164, 106 P. 2d 314; *Johnson v. Western Express Co.*, 107 Wash. 339, 344-5, 181 P. 693. As stated in the *Johnson* case, *supra*:

It is a well established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture.

In the instant case the trial judge flagrantly violated this fundamental rule. The crucial findings—that federal employees placed the bombs where they were found, that they were acting within the scope of their employment, and even that they acted negligently when they did so—are the result of a chain of assumptions and inferences stemming from other assumptions and inferences instead of from direct evidence. See *supra*, pp. 20-22. These findings, accordingly, have no legal evidentiary basis in the record. They must be regarded as without sufficient support in the evidence and as clearly erroneous. The trial judge erred in not granting the Government's motion

to dismiss made at the conclusion of appellee's affirmative case (R. 151-4). He erred again in not granting the motion when it was renewed at the conclusion of the trial (R. 227). If the rule against piling inference upon inference is a valid one—and the overwhelming number of cases applying the rule demonstrate its validity—the judgment below must be reversed.⁷

⁷ While we have found no case in which a trial judge has gone to such extremes as did the court below to fill an evidentiary vacuum so as to impose liability under the Tort Claims Act, reference should be made to a few cases in which the trial court was, in effect, requested to do so but, correctly, refused. Thus, in *Bowden v. United States*, 200 F. 2d 176 (C. A. 4), plaintiff left a herd of sheep on an island which was taken over by the Navy and another federal agency. Returning a few years later, he discovered that the sheep somehow had been destroyed. In a suit against the Government, his evidence showed that part of the island had been sprayed with DDT on several occasions. But the court observed that it was also possible that the sheep may have been killed by federal employees occupying the island, or by their dogs. The court refused to impose liability, stating that the plaintiff must prove negligence by something more than conjecture and speculation.

The plaintiffs in *Rolon v. United States*, 119 F. Supp. 432 (D. P. R.), were injured by an explosion of a portion of a mortar shell that one of them had picked up on a public road where it had apparently been abandoned. There was an Army base in the immediate vicinity. The court stated that even assuming the shell belonged to the Army, plaintiffs' inability to establish that it got there through the negligence of some federal employee while acting within the scope of his employment precluded recovery. The court refused to fill the evidentiary gap by indulging in "a chain or series of inferences."

In *Curtis v. United States*, 117 F. Supp. 912, 913 (N. D. N. Y.), plaintiff sought damages for the loss of mink sustained when two military aircraft negligently flew low over his mink farm. The court held that even though plaintiff had estab-

B. The doctrine of *res ipsa loquitur* is not applicable in this case

1. Having determined *by inference* that the bombs came from some plane, that the plane was probably a military one, that it was piloted by military personnel, and that it was under the exclusive control of the Government, the court below then ruled that the doctrine of *res ipsa loquitur* may be invoked in these circumstances so as to establish negligence (R. 229-230). This ruling was manifest error because appellee wholly failed to lay a sufficient foundation for invocation of that doctrine. Actually, this case should be governed by the familiar precept that negligence must be proved, and never will be presumed; that the mere fact that an accident has occurred, or that an injury was sustained, is not evidence of negligence.

That precept is, of course, subject to the qualification that the fact of negligence can be proved by circumstantial evidence. The doctrine of *res ipsa loquitur*,

lished that the planes were of a military type and were flown negligently, he had failed to establish both that they were flown by federal employees and that such employees were acting within the scope of their employment. To assume these two facts "would be to pile inference upon inference. * * * The dividing line between logical inference and pure speculation is not easily drawn, but in the Court's opinion it would be pure speculation to find in the absence of a single bit of evidence that the planes in question were operated by United States military personnel upon a regular training mission, when it is just as probable that they may have been operated by National Guard personnel, not in federal service although using federal equipment. Under such circumstances the defendant would not be liable. * * * The circumstances are such that the Court would like to reimburse the plaintiff for the damages caused, but generosity is not the function of the court in determining litigation."

however, is simply an application of the circumstantial evidence rule to a negligence case. Through that doctrine the law recognizes that an accident may happen under such circumstances "that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant" (*Morner v. Union Pacific R. Co.*, 31 Wash. 2d 282, 196 P. 2d 744, 748-9). The doctrine means no more than "that the facts of the occurrence warrant the *inference* of negligence, not that they compel such an inference" (*Sweeney v. Erving*, 228 U. S. 233, 240; emphasis added). But it is always important to bear in mind that *res ipsa loquitur* is only a rule of circumstantial evidence and, as such, it is subject to the maxim that, "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed." *Chic. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 477. "In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture * * *." *Prentice Packing and Storage Co. v. United Pacific Ins. Co.*, 5 Wash. 2d 144, 106 P. 2d 314, 322. And see *supra*, pp. 23-24.

At the very outset, then, it is apparent that the doctrine of *res ipsa loquitur* cannot be applied in this case because to do so would be to contravene the rule, which we have already discussed, against piling inference on inference. Here, substantially all of the circumstances surrounding the incident—the very circumstances which are said to bring the inference doctrine of negligence

(i. e., the *res ipsa loquitur* theory) into play—are themselves the product of inferences. See *supra*, pp. 20–22. In that situation application of the doctrine is not permissible.

2. The circumstances which a plaintiff must prove before the doctrine can be invoked under Washington law are set forth in the leading case of *Morner v. Union Pacific R. Co.*, 31 Wash. 2d 282, 196 P. 2d 744. Among the elements he must establish are these: (1) “The wrongdoer must be identified. The circumstances of an accident may permit an inference * * * that someone has been negligent, but not that any particular person rather than another has been negligent” (*ibid.*, 196 P. 2d at 751); (2) the defendant must have had “sole and exclusive control of the agency or instrumentality which actually caused the injury” (*id.* at 750); and (3) the accident must be such as in the ordinary course of events would not occur without someone being negligent (*id.* at 748).

We have already noted that appellee offered no direct evidence, and the record is devoid of any, concerning the identity of the person who placed the bombs, which the Osbornes found, in the gulley. The conclusion that such person was a federal employee acting within the scope of his employment was arrived at by piling inference on inference. The same is true of the trial judge’s speculative conclusion that the bombs were dropped from a military or Army bomber. Even when the other requisites of the doctrine are present the Washington courts hold that the “one charged under the doctrine of *res ipsa loquitur* is not to be put to his proof unless there is

some showing of cause—careless construction, lack of inspection, or misuser. The cause of the accident—the offending instrumentality—must be identified before one charged is put to answer.” *McClellan v. Schwartz*, 97 Wash. 417, 166 P. 783, 784.⁸

Appellee similarly failed to establish exclusive control of the instrumentality in the Government. When found, the bombs were on private property not far from a public road. The area was many miles from any government reservation. There was no direct evidence whatever to indicate who had possession or control of the bombs before they were placed there. In *Obertoni v. Boston & M. R. R.*, 186 Mass. 481, 71 N. E. 980, a boy was injured by a railroad torpedo found on defendant’s grade crossing. Reversing a judgment for the plaintiff, the Supreme Judicial Court said (71 N. E. 981):

The burden is on the plaintiff to prove that it came there by act of the defendant or of its employees in the course of its business. We are of the opinion that, from its presence on the planking, the jury were not warranted in inferring that it was there through an act of an employee, done in the course of the defendant’s business.

To the same effect are *Birnbaum v. Philadelphia & R. Ry. Co.*, 249 Penn. 238, 94 A. 925, and *Sward v. Megan*, 284 Mich. 421, 279 N. W. 886. It is significant,

⁸ In that case, plaintiff was assisting defendant’s servant in hauling on a rope attached to an overhead block and tackle when the latter broke off and struck plaintiff. The court held that in the absence of evidence, other than inferences, that the accident occurred through any defect in the block and tackle or its rigging, a nonsuit was proper.

moreover, that if the Government did in fact have exclusive control over the bombs at one time, that control had long been relinquished before the accident. The bombs were found on private property which was fenced in. When found they were in the possession and control of the owner of that property. When picked up and carried away from the premises they were in the control of the Osbornes. The Osbornes gave them to appellee who put them in his basement, and for over a year before the accident they were wholly in his possession and control.

Even if a plaintiff does establish exclusive control of the instrumentality in the hands of the defendant, he has the additional burden of showing that "the accident could not have happened without negligence." *Nopson v. City of Seattle*, 33 Wash. 2d 772, 207 P. 2d 674; *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 P. 995, 996. Cf. *Gardner v. Seymour*, 27 Wash. 2d 802, 180 P. 2d 564, 571: "* * * while the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof [of negligence], it is only where the circumstances leave no room for a different presumption that the maxim applies." In *Wilson v. Northern Pacific Ry. Co.*, 44 Wash. 2d 122, 265 P. 2d 815, 819, the court declared that, "If the existing state of affairs, however dangerous, might, according to the ordinary experience of mankind, have been due to other causes than negligence for which the defendant was responsible, then it was for the plaintiff to exclude the operation of those causes by the greater weight of the evidence." In the present case, appellee made no attempt through testimony or

other evidence to show that only by virtue of someone's negligence could the bombs have dropped in an unauthorized area. Absent such evidence, the trial judge purported to make this a subject of judicial notice. But the manner in which bombs are attached to or released from a plane is not such a matter of common knowledge that it can be presumed that negligence is the only permissible or reasonable explanation. Other feasible and logical explanations, in which negligence plays no part, are equally apparent—they may have fallen from a defective bomb-rack; they may have shaken loose in turbulent weather; they may have been released purely through accident; etc. In the absence of evidentiary material or of general experience warranting judicial notice that negligence is the one reasonable explanation of the event, the doctrine may not be invoked.

C. The district court's findings that there was negligence in failing to post warning signs concerning the bombs and in the manner of their manufacture were erroneous as a matter of law

In addition to having found that it was the Government which negligently dropped the bombs on private property, the district court's Findings state that the Government was also negligent (a) in failing to post signs warning of the dangers of the bombs, and (b) in constructing the bombs in such manner that their tail fin would become detached so that they then would not appear to be bombs (R. 13-14). Necessarily, liability under both of these findings is premised on the preliminary findings that the bombs were placed on the property by federal employees acting within the scope of their employment. If we

are correct in our earlier discussion that the latter findings of fact are not warranted by the record, then the two additional conclusions of negligence as a basis for liability must also fall. But even when viewed without reference to the preliminary findings, both conclusions are erroneous as a matter of law.

1. Liability for negligence is based upon the violation of a duty owed to the person injured. If there is no duty, or if that person is outside the class to whom the duty is owed, no action is maintainable. Appellee, we submit, utterly failed to establish facts giving rise to any duty to post warning signs. There is no evidence whatsoever in the record indicating that the United States knew, or reasonably should have known, of the presence of the bombs on the private property, and the trial court made no such finding. The Osbornes, who found the bombs, had permission of the owner of the property to hunt on the premises. They were merely licensees. Even the owner of property owes no duty to warn a bare licensee of the presence of any dangerous condition or object on his premises unless he has *actual* knowledge of some concealed danger and realizes that the licensee will not discover it. A licensee has no right to demand that the land be made safe for his reception; he has no right to expect the owner to inspect the premises to discover dangerous objects; he must assume the risk and look out for himself. *Prosser on Torts* (2d Ed., 1955), p. 445. The only duty that an owner or occupier of land has to a licensee on his premises is not to wilfully or wantonly injure him. *McNamara v. Hall*, 38 Wash. 2d 864, 233 P. 2d 852.

If the owner or occupant of the property, who has possession and control of the premises as well as the opportunity to inspect them, owes no duty to warn a licensee of a dangerous object on the premises, certainly the United States, who had no knowledge of the presence of danger, and no legal right to enter or inspect or mark up the property, has no such duty. And if the duty is not owed to a licensee, surely it is not owed to a donee of the licensee, which was the status of appellee.

Affirmative obligations to warn of the dangers on land flow from the fact that the one in possession is in a position of exclusive control and therefore is best able to prevent harm to others. See F. H. Bohlen, *The Moral Duty to Aid Others as the Basis of Tort Liability*, 56 U. of Pa. L. Rev. 217, 233-4. Obviously, if employees of the United States had sought to inspect or to post signs on the private property, as the court below held they should have done, they would have committed trespass. Where there are dangers on land, even though created by a third party, whatever duty there may be to remove them or to warn about them rests solely with the present owner or occupant. *Virginian Ry. v. Mullens*, 271 U. S. 220, 227; *United States v. Inmon*, 205 F. 2d 681 (C. A. 5). The courts will look no further back than the last wrongdoer "especially when he has complete and intelligent control of the consequences of the earlier wrongful act." *Kilmer v. White*, 254 N. Y. 64, 171 N. E. 908, 910; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 15 N. E. 84, 87.

2. The determination that there was negligence in the manner in which the bombs were manufactured or constructed appears on its face patently erroneous. This finding relates to the design of the bomb. We know of no case which has ever held that the United States owes any duty to anyone to design or construct its munitions in such manner that they will readily appear to be a dangerous object. It hardly seems necessary to suggest that the prime consideration in the design and construction of munitions is to accomplish the purpose for which they are to be used, whether it be in actual combat or in training for combat. It is, we submit, not a tort for the United States to construct a bomb in such a way that its tail fin will drop off. In any event, no actionable claim is cognizable under the Tort Claims Act for asserted negligence in the planning or design or construction of bombs because that kind of claim clearly is excluded under the discretionary function exclusion of the Act, 28 U. S. C. 2680 (a). Cf. *Dalehite v. United States*, 346 U. S. 15.

II

Appellee failed to establish that the conduct of federal employees was the proximate cause of his injuries

Assuming *arguendo* that the bombs were dropped from a military plane which was piloted by military personnel while acting within the scope of their employment, and assuming further that the bombs were dropped through some negligent conduct in the plane, there was, we submit, no proximate causal relationship between such conduct and appellee's injuries. For, if there was negligent conduct, it was not negli-

gence toward appellee. Moreover, there were entirely unforeseeable and independent intervening acts of third persons after the force set in motion by the Government came to rest. Additionally, the appellee himself was not free of contributory negligence.

1. To obtain recovery in a negligence suit, the claimant must show that he was within the class of persons to whom defendant owed a duty of due care. While a defendant's conduct may constitute negligence as to some persons—that is, when the actor's conduct creates a foreseeable risk of harm to a particular class of persons—that same conduct cannot be regarded as negligence toward another person who is injured but who is outside the foreseeable orbit of danger. This is the familiar rule of *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, where the court also observed that a party may not recover “as the vicarious beneficiary of a breach of duty to another” (162 N. E. at 100).⁹ Stated another way, there is no duty to an unforeseeable plaintiff. See *Restatement of Torts*, § 281, Comment c.

Applying this principle to the present case, it is apparent that the class of persons toward whom there is a foreseeable risk of harm in dropping the bombs from a plane includes those whom the bombs might strike and those in the immediate vicinity who might be hurt when the bombs hit the ground and explode. But the orbit of foreseeable danger can hardly be said to include persons like appellee who moved to the area

⁹ The *Palsgraf* case has been referred to approvingly by the Supreme Court of Washington in *Sitarek v. Montgomery*, 32 Wash. 2d 794, 203 P. 2d 1062, 1066.

some considerable period—perhaps years—later, and who himself was never at or near the spot where the bombs were dropped. It taxes credibility to suppose that a reasonable person could foresee, first, that the bombs would not explode, second, that the bombs would remain undiscovered for some years, third, that some casual licensee would enter another person's premises and, upon finding the objects, commit a tort (conversion) by picking them up and carrying them away, fourth, that he would make a gift of them to still another person who resides miles away, fifth, that such other person would leave the strange objects around his house for over a year during which period he would examine them several times but would fail to learn or try to find out what they are, and sixth, that such person would forcefully beat the objects with heavy hammer blows preparatory to tossing them into a melting pot. Appellee's position, both in respect to time and distance from the event, is clearly too remote to be within the class of persons who reasonably could be anticipated as being within the recognizable zone of danger created by the dropping of the bombs.

2. What has been stated above underscores another point: that the supposed negligent conduct was not the proximate cause of the injury. The usual definition of proximate cause, and the one accepted in Washington, is "that cause which, in a natural and continuous sequence, *unbroken by any new, independent cause*, produces the event, and without which that event would not have occurred." *Cook v. Seidenverg*, 36 Wash. 2d 256, 217 P. 2d 799, 803 (emphasis added).

Here, the record demonstrates that the accident which caused appellee's injuries was not part of a natural and continuous sequence beginning with the dropping of the bombs. If the Government was negligent, that negligence was insulated by the superseding and independent events set out above (*supra*, pp. 35-6). The tortious removal of the bombs by the Osbornes, their gift of the bombs to appellee, the unusually long period of time they lay in appellee's basement, the unexpected and violent treatment given them by appellee, all of which, while in the realm of possibility, clearly were not within the range of probability or reasonable expectation. In such circumstances there is no proximate cause. Cf. *Schmidt v. United States*, 179 F. 2d 724 (C. A. 10); *Sitarek v. Montgomery*, *supra*.

3. We believe, finally, that a careful review of the record, when measured by the standards of Rule 52 (a), F. R. C. P., will disclose that the district court's finding that appellee was not contributorily negligent is clearly erroneous. See *United States v. United States Gypsum Co.*, 333 U. S. 364, 395. Appellee was not an infant. At the age of 47 when the accident happened, he admitted that he had been handling firearms and ammunition all of his life. The use of guns and the making of bullets at home were his hobby. He kept a collection of live bullets in his home. R. 145, 147. He even kept a mortar shell around his house which still contained enough powder in it to cause considerable harm. R. 218-226. While he claimed to be unfamiliar with bombs, considering

that he was a person of wide experience in munitions and lived in a community where it was common knowledge that the Navy had engaged in practice bombing on target ranges nearby, he was certainly not exercising normal or reasonable caution when he violently beat and hammered an unfamiliar metal object which he himself feared would *explode* if it were thrown into the melting pot in its raw state (R. 133-4). If appellee is to look to anyone for redress it would seem that he should look to his brothers-in-law, the Osbornes, who saw fit to carry off the strange objects from someone else's property and gave them to him.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and to enter judgment for the United States.

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NOVEMBER, 1955.

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs

ELMER G. COFFEY and MRS. ELMER G.
COFFEY, husband and wife,

Appellees.

No. 14836

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE APPELLEES
ELMER G. COFFEY & MRS. ELMER G. COFFEY

POWELL & LONEY
Attorneys for Appellants

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BRIEF FOR THE APPELLEES
ELMER G. COFFEY & MRS. ELMER G. COFFEY

POWELL & LONEY
Attorneys for Appellants

STATEMENT OF PLEADINGS

Appellees, Mr. and Mrs. Elmer G. Coffey, brought this action against the United States of America seeking a recovery for the injuries sustained by Appellee Elmer G. Coffey under the authority of the Federal Tort Claims Act, 28 U.S.C. 1346(b). This was alleged in paragraph 1 of the complaint (R.3). Appellee's injury was caused by the negligent actions of the government employees while acting within the scope of their employment and under such circumstances that a private person would have been liable under the laws of the State of Washington (R.7, 8).

The District Court for the Eastern District of Washington, Southern Division, being the district in which appellees reside (R. 3) and in which the accident occurred (R. 5) entered judgment for appellees (R. 16) awarding them a sum of money to compensate them for the injuries to Appellee Elmer G. Coffey. Appellant did not complain about the amount of the award (App. Br. 14, 15), but questioned the liability. Accordingly an appeal was entered and this court has jurisdiction to review the action.

COUNTER STATEMENT OF THE CASE

A. RESTATEMENT OF THE EVIDENCE.

Appellant in its brief, pages 3 through 10, set forth a summary of the evidence presented in the District Court.

The manner of presentation of certain facts, however, tend to distort the actual evidence heard by the trial judge. It is hoped that a brief review of the evidence will assist this honorable court in evaluating this cause.

During World War II the Department of the Navy owned and operated a Naval Air Training Station at Pasco, Washington (R. 189). In November 1943, this base was converted from a training field to a practice bombing base (R. 190). An examination of the two maps introduced in evidence (Ex. 8 and 15) indicates that although the Pasco Air Station is in Franklin County, Washington, it is just across the Columbia River from Richland, Washington, location of the Hanford Works Plant; the center of the Columbia River being the dividing line between Benton and Franklin County. All of the events involved in this trial took place in Benton County, Washington. There was only one bombing target range used in Benton County, Washington, (R. 200) and as shown by Exhibit 8, this was situate between Benton City and Richland, Washington. Beyond a shadow of a doubt, the evidence (R. 71-3, 87-8, 103-7, 173, 216-7) discloses that military personnel used a Mark 19, 13 pound lead practice bomb on this range between November 1943 and the end of the "shooting war" (R. 204).

The offending object which caused the injury is a bomb designated by the military as a Mark 19 A & N 13

pound practice bomb (R. 157) It is a cylindrical object approximately 12 inches long made of lead with a hole running through the center. Exhibits 1, 2, 9, 10 and 11 are all bombs that have been used and dropped (R. 65, 68-9, 70, 107, 181, 184). Exhibit 12 is a specimen of the bomb before use. As shown by the evidence this bomb has peculiar characteristics:

- (1) It is constructed in such a way that when it is used the tail fins drop off (R. 176).
- (2) Unless the bomb lands in just the right position, it will not explode (R. 172-3).
- (3) The hole running through the center is open on both ends (Exhibit 12) and upon being dropped, rocks or dirt will lodge in it (Exhibit 2).
- (4) Only a portion of the bombs bear any markings (R. 180).
- (5) After being used, the bomb appears to be a lead sinker or lead conduit (R. 39, 137) and its appearance completely belies the fact that it contains an explosive charge.

These characteristics, coupled with the fact that the bombs were used and left in a farm area far from the bombing range (Exhibit 8), produced the result which would be expected. Appellee Coffey, attempting to make use of the lead object, was injured by the hidden explosive charge (R. 135).

B. CERTAIN STATEMENTS OF FACT MADE
BY APPELLANT IN ITS BRIEF ARE NOT
SUPPORTED BY THE EVIDENCE.

1. The government refers to the gulley where the bombs were found as being surrounded by rough, rocky and hilly terrain (App. Br. 3). Actually, as shown by Exhibits 3, 4, and 5, there are rolling hills and the gulley is rather small in both width and length with pasture land on both sides (R. 128-132).

2. Counsel assert that Albert Osborne, one of the witnesses, knew about the naval bombing ranges and that the navy had posted "KEEP OFF" signs near these ranges (App. Br. 4). The record (R. 47-8, 52) would indicate that Mr. Osborne was talking about the Pasco Navy Air Base and that the keep off signs that he mentioned had to do with the fences and restrictions around the Pasco Naval Flying Field. He specifically refers to them as airplane landing and take-off areas (R. 48). He further stated that he knew about the navy dropping bombs in the Spokane area (R. 48). But as the court points out, the area Mr. Osborne was talking about was a long way from the Pasco, Richland, Benton City area (R. 52).

3. The sweeping statement is made that either Mr. Osborne or Appellee Coffey knew about bombing ranges in the general area or the possibility of bombs in the area (App. Br. 4, 5). The only evidence in the record relates

to the knowledge of a bombing range at Zillah (R. 52) and a bombing range in the Spokane area (R. 48). Undoubtedly, the records of the Department of the Army and the Department of the Navy will disclose that these areas are many many miles from the place in question.

4. Counsel also make a point of the fact that these practice bombs were similar in form to the "bomb or dud" which was kept by Mr. Coffey (App. Br. 4). The record will show that the "bomb or dud" under discussion was a 60 millimeter H. E. mortar round (R. 225). The bombs involved in this case (Exhibits 1, 2, 9, 10 and 11) do not in any way resemble this mortar shell.

5. The government refers to the testimony of Mr. Coffey that the lead object had to be cleaned before being put in the melting pot or a "small explosion" would result (App. Br. 6, 38). Mr. Coffey was explaining what would happen if any dirty or foreign material were placed in a pot of melting lead (R. 133-4). This would cause the pot to bubble up or explode with possible injuries to those nearby. Such a possibility however, is an entirely different problem than the explosion created by a live unexploded practice bomb. It is far from the danger created by placing dirt in a pot of melted lead.

6. The statement is made that this type of practice bomb is used only in horizontal bombing (App. Br. 7). It is believed that the evidence does not support this con-

clusion. The only testimony counsel refers to in the record (R. 157, 162) concerns the government booklet describing the uses for this bomb. Under the evidence of Sgt. McCammon, James Dixon, and even Chief Warrant Officer Dickey, these bombs were used on the target range near Richland, Washington, which target range was only for skip bombing or dive bombing practice (R. 71, 73, 216-217, 87-88, 107, 108, 173, 175, 193). Captain Smith's testimony as to its use must be tempered by his explanation that he had never seen this bomb until the trial (R. 205).

7. The statement is also made that the bombing area in Benton County was enclosed by fence and warning signs were posted every 200 feet (App. Br. 7). Captain Smith's testimony (R. 200) indicates that the Captain wasn't familiar with the interval of posting and that there was only one sign that he knew about which he had seen while driving by. There was no other evidence in the record, although it was readily available to the appellant, showing any other precautions taken.

8. The government asserts that no violation of the regulations prohibiting the dropping of ordnance in an unapproved area was ever reported to naval authorities (App. Br. 8). The only evidence on this subject was Captain Smith's statement that he had never heard of any violation (R. 199).

9. Appellant suggests that Mr. McKnight found these practice bombs in a different area than the offending bomb (App. Br. 9, 20). An examination of the testimony, together with Exhibits 3, 4 and 5, conclusively shows that all of the bombs were found in the same place (R. 23, 40, 103) (Ex. 8).

10. Appellant also states that the testimony concerning the Osborne bombs and those found by McKnight was different and further that the markings on the bombs could have resulted in a way other than having been dropped by the military (App. Br. 10). The testimony shows that all of the bombs were found under the same circumstances and had the same general appearance. They were all covered partially by dirt (R. 107, 24). Sgt. McCammon ventured that the markings on the bombs *could* have been made by someone dragging them across the ground (R. 65) an the other expert, Chief Dickey, testified that the ends *could* have been plugged by water forcing rocks in the openings (R. 185). These suggestions weren't even taken seriously by the experts themselves, much less by the court (R. 186). It is hard to visualize a person dragging such a bomb across the ground. Chief Dickey's' explanation stretches the imagination beyond normal limits. These government experts were grasping at straws. In the words of Chief Dickey: "A. Yes, I could say with reasonable certainty that they were dropped

from an aircraft.” (R. 184). No place in the record can appellant point to any evidence which permits even an unreasonable inference that the bombs were placed in the spot where they were found by other than military aircraft engaged in practice missions. No such suggestion was made to the lower court by the counsel who tried the case, and for the first time on appeal, counsel for the United States remarks that the bombs might have been dropped by National Guardsmen. The record is devoid of support for this comment.

ARGUMENT

The issue in this case revolves around the right of the United States Government acting through its military personnel to drop a harmless appearing lead object upon private property that had never been a bombing range and then to disclaim any responsibility for injuries sustained by a person using the lead object in a normal manner. It is undisputed that only an expert would know of the hidden explosive contained in the piece of lead.

I. THE EVIDENCE INTRODUCED ESTABLISHES WITHOUT QUESTION THE NEGLIGENCE OF THE GOVERNMENT AND APPELLEE’S RESULTING INJURIES.

The United States owned and controlled certain Mark 19 13 pound practice bombs made of lead and exclusively used for practice bombing in the training of military

personnel (R. 155-7). These bombs were under the complete custody of the United States Government and were disbursed only to its proper authorized agents for such use (R. 174). It was further proved there was only one bombing range for use by military personnel in Benton County, Washington, and that was approximately 10 miles from the scene of this occurrence (Ex. 8). This bombing range was used only for the purpose of skip and dive bombing by naval pilots stationed at the Pasco Naval Air Station (R. 192). By the far greater weight of the evidence these 13 pound practice bombs were used on the range in Benton County, and, as would be expected, there were many cases of near miss by the naval pilots resulting in the depositing of the objects outside this bombing range (R. 71-3, 88, 173, 216-7). For these locations outside the range, attention is invited to Exhibit 8 as it was marked by the witnesses (R. 73, 88). Further, the undisputed evidence disclosed that these bombs were dropped by the military in a gully near Benton City, Washington (R. 61, 103-4).

The government's evidence proved that by the very nature of the construction of the bombs, when used the tail fins would drop off (R. 172). Unless they landed in exactly the right position the charge would not be detonated (R. 173). After having dropped they would become a harmless looking object in the nature of a piece of lead

conduit or sinker without tail fins and without any warning signs (Ex. 1, 2, 9, 10 and 11). This particular salvo lay scattered in the gulley until they were discovered by the brothers-in-law of Mr. Elmer Coffey. At the end of the war the government ceased to use the target bombing range. The record contains no evidence of any effort made on the part of the United States or its employees to clean up the bombing range, or to warn the public of the possibility of live bombs in the area. No attempt was made to find these bombs dropped near Benton City, nor was any attempt made to warn the people that they had been dropped and to beware such harmless looking objects. Thus it was that the appellee, while cleaning this piece of lead, sustained a severe and disabling injury.

The three experts who testified at the trial, Sgt. McCammon, Captain Smith and Chief Warrant Officer Dickey, all agreed that the bombs were dropped there by aircraft (R. 70, 184, 226). The only dispute in the testimony was whether it was army or naval aircraft. The evidence preponderates in favor of the naval aircraft. The government doesn't object to the Finding of Fact VII that the bomb was used exclusively by the Department of the Navy and the Department of the Army, nor is there any evidence by which it could dispute this fact.

The evidence admits only two possibilities, one of which is so remote as not to merit consideration. The only

probability is that the government military aircraft dropped the bombs while engaging in practice missions. A highly unlikely possibility is that some third person placed the bomb there, but in the testimony of Chief Dickey, it would have been necessary that he not only place them there, but sit upon them as well.

As the court said in *Gas Service Co. v. Hunt*, 183 F. (2d) 417, 421:

“ . . . the origin of the fire . . . could be shown by facts and circumstances from which the inference could reasonably be drawn, and it was not necessary that the evidence be so strong as to exclude every other possible source of the fire . . . ”

This is not the same problem that was raised in *Westland Oil Company v. Firestone*, 143 F. (2d) 326, 331, where the court said:

“Where evidence is equally consistent with two opposing hypothesis, it is without probative force and tends to support neither.”

The evidence in this case was of the highest grade that could have been offered under the peculiar problem involved. As stated by the text writers in 20 Am. Jur. 258:

“The competence of circumstantial evidence is not open to question . . . ”

“ . . . When necessity for resort to circumstantial evidence arises either from the nature of the inquiry or

the failure of direct proof, considerable latitude is allowed in the reception of circumstantial evidence. No evidence should be excluded of any fact or circumstances connected with the principal transaction and dispute from which an inference as to the truth of a disputed fact can reasonably be made.

Page 261:

“The modern doctrine is extremely liberal in the admission of any circumstances which may throw light upon the matter being investigated.”

The court said in *Brucker v. Matsen*, 18 Wn. (2d) 375, 382, 139 P. (2d) 276.

“We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown.”

See also *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807.

Mathis v. Granger Brick and Tile Co., 85 Wash. 634, 149 Pac. 3, involved a similar problem which the court handled as follows:

“and that while there is no direct testimony concerning the manner in which these caps found their way to the place where the boys obtained them, it was a reasonable and natural inference which the jury would be warranted in drawing from the facts proven, that they came there as a result of the work which was going on . . . and through the agency of the men operating the drill.”

In *Gardner v. Seymour*, 27 Wn. (2d) 802, 180 P. (2d) 564, it was held that where there are two consistent

theories and one of them would obsolev the defendant while the other would hold him negligent, the jury will not be allowed to speculate, but upon a showing that it could not reasonably have happened in any other way, the inference is legitimate.

As further explained by the text writers in 20 Am. Jur. 169, the courts have used the phraseology, "inference upon inference" as merely a way of disposing of evidence which is regarded as too remote. The text writer points out that the real meaning of the decisions is that they won't allow an inference to be drawn from uncertain or speculative evidence when the inference raised is merely conjecture or possibility and as stated:

"It is further clear that many courts while recognizing that an inference upon an inference should not be allowed when the fact sought to be established is capable of more satisfactory proof by direct evidence within the power of the party assuming the burden of proof, or when the reasonable necessities of the case in the interest of justice do not require that one inference be based upon another inference, have nevertheless repudiated any intention of adhering to a general rule prohibiting an inference upon an inference."

Here the evidence permits of only one inference, namely that the United States military personnel dropped these bombs in the gulley while practicing. As a side-light, neither the House of Representatives, the Senate nor the Secretary of the Army was troubled by the inference

problem. During the 84th Congress, Private Law 389, chapter 727, 1st section S.476 was passed for the relief of Harold Swarthouth and L. R. Swarthouth. House Report No. 1143, and Senate Report No. 679, disclosed that a boy had been injured as a result of a bomb found near an abandoned farmhouse not in an army practice area. The report stated as follows:

“The Department of the Army reports that the three bombs mentioned were not found by the Hickey’s within an Army practice area. Neither is there anything in the army’s records to show how the bombs came to be located near this abandoned farmhouse where they were found, nor who placed them there. Notwithstanding this, the type of bomb indicates they were dropped by members of the United States Army Corps. That they were found near an abandoned house (a likely target for practicing airmen), together with the fact that the noses of the bombs were crushed and broken open indicates these bombs were dropped from one or more airplanes.”

The committee reports acknowledge that the activity being carried on by the government is ultra-hazardous in that it “necessarily involves a risk of serious harm to the person of others . . . ”

Under the authorities and the evidence, the most reasonable and permissible inference to be drawn is that the United States Government dropped these bombs while engaging in practice bombing activities and that the bombs were dropped on property other than a government reservation in violation of the regulations (R. 198).

II. THE DOCTRINE OF RES IPSA LOQUITUR DOES APPLY TO THESE FACTS.

It was negligence for the United States to drop their practice bombs in this area. More especially considering the admitted facts that such a bomb would very likely not explode, that its tail fins would fall off, that no warning of its dangerous nature was evident, and that it would appear to be a harmless piece of lead conduit or sinker. Without question the law imposes upon the government the duty to exercise the highest degree of care in pursuing this activity. *Ford v. U. S.*, 200 F. (2d) 272, 275 (C. A. 10).

“Ordinarily persons having dangerous explosives in their possession and control are required to exercise the highest degree of care not to injure others . . .”

In *Meara v. United States*, 119 F. Supp. 662, 664, there was no direct testimony showing how government explosives were placed where they were found. The opinion, quoting from *Fourseam Coal Corp. v. Hatfield*, 279 Ky. 132, 130 S. W. (2d) 73, holds that the owner of an explosive “is required to exert the highest degree of care . . . and that duty never ceases . . .”

This is the rule in Washington. *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140; *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3; *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Boggus v. King County*, 150 Wash. 578, 274 Pac. 198.

The doctrine of *res ipsa loquitur* has been defined as "a common sense appraisal of the probative value of circumstantial evidence." *George Foltis, Inc. v. N. Y. City*, 287 N. Y. 108, 115, 38 N. E. (2d) 455, 153 A.L.R. 1122. The court further said:

" . . . In the administration of the law we must be satisfied with proof which leads to a conclusion with probable certainty where absolute logical certainty is impossible."

The U. S. Supreme Court has described the doctrine:

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference;"

Sweeney v. Erving, 228 U. S. 223, 240, 33 S. Ct. 416.

This rule prevails in Washington. *Singer v. Metz Co.*, 107 Wash. 562, 567, 182 Pac. 614, 186 Pac. 327; *Genero v. Ewing*, 176 Wash. 78, 82, 28 P. (2d) 116, *Briglio v. Holt & Jeffery*, 85 Wash. 155, 159, 147 Pac. 877; *Kolbe v. Pacific Market Delivery & Transfer*, 130 Wash. 302, 305, 226 Pac. 1021; *Pacific Coast Ry. Co. v. American Mail Line*, 25 Wn. (2d) 809, 818, 172 P. (2d) 226.

As stated by the writer in 13 Wash. L. R. 215, 220:

"The prerequisites to the application of the doctrine, then are: (1) that the circumstances be such as to logically allow a presumption of negligence; and (2) that the circumstances suggest superior knowledge or opportunity for explanation on the part of the party charged."

Turning to the evidence before the court, is it reasonable to assume that the government was negligent in dropping these practice bombs in such an area, outside an authorized target range. Appellees believe that the undisputed facts are much stronger. The only conclusion to be drawn is that the government was negligent. The government was engaged in an ultra-hazardous activity. It was charged with the knowledge that these objects after use would not remotely resemble a bomb. The objects were dropped at an unauthorized location, and the government failed to issue any warnings, post any signs or carry out any clean up activities.

No attempt was made by the government to explain or introduce evidence to show why the bombs were dropped there. This information was within the knowledge of appellant and not appellees. No government records were introduced to show the distribution of these bombs. The only evidence offered was the testimony of Captain Smith who stated that although he was commander of the Pasco Naval Base until August, 1944, he never had seen a bomb of this type and didn't know they were used (R. 205). The last year of the war Captain Smith was away from the Pasco base (R. 203). The testimony of two government ordnance men (R. 71, 173) and a civilian (R. 87) proved that many of these same bombs were on and around the naval target range, but

the government still concludes the bombs weren't used at the Pasco Naval Base.

Appellant points to the trial court's remark about being "puzzled" and "guessing." Actually the only cause of this puzzlement was the unreconcilable testimony of Captain Smith about the use of these bombs at Pasco in the face of the other witnesses who found them all over and around the Naval target range. As the Court remarked however, it isn't necessary by the very nature of the case to pinpoint the service which actually dropped them. It was only the Army and Navy that used these bombs.

The evidence presented calls for the use of the doctrine of *res ipsa loquitur*. The record is clear and requires no speculation or conjecture. It calls for an explanation by the government and the government is silent.

III. THERE IS NO BASIS FOR HOLDING THAT THE GOVERNMENT EXERCISED DUE CARE.

Measuring the government's actions in light of this hazardous activity, the standard of care used was certainly below that required by an individual.

There is no rule of law which would allow appellant to be shielded by the landowner's duty. The relationship between the landowner and the Osbornes can furnish no immunity to the government. It had no right to deposit

explosives on this land and was a stranger to this landowner.

Likewise having dropped the bombs there, the government cannot now be heard to say that it had no knowledge of the presence of these bombs. From the evidence here it would appear that nowhere in Benton County did the government attempt to corral these bombs. The argument of counsel that appellant had no right to enter the premises and seek these harmful objects or warn others of their presence (App. Br. 33) is tantamount to saying that a person has a legal right to drop explosives on the land of another because any corrective action taken would be a forbidden trespass.

Counsel also assume that although only an expert would recognize these as bombs, yet the only duty to clear them rested upon a landowner:

“especially when he has complete and intelligent control of the consequences of the earlier wrongful act.” (App. Br. 33).

It was negligence for the United States to construct this bomb in the manner used. It would be obvious to anyone that a bomb with these characteristics would without question cause injury because of its innocent appearance. There were no markings on the object to warn users even though it didn't resemble a bomb.

Appellant relies upon the Texas City disaster case, *Dalehite v. U. S.*, 346 U. S. 15, 73 S. Ct. 956. It will be noted that this decision was based on the concurrence of only four judges including Mr. Justice Reed, author of the opinion. Three judges dissented and two others did not participate. This disagreement between the majority and dissent was substantial as indicated by Mr. Justice Jackson's language in the minority opinion (73 S. Ct. 975):

“ . . . The civil damage action, prosecuted and adjusted by private initiative . . . is one of the law's most effective inducements to the watchfulness and prudence necessary to avoid calamity from hazardous operations in the midst of an unshielded populace.”

The authority of the Dalehite's “discretionary” rule is seriously undermined by a five to four decision in *Indian Towing Co., Inc., v. U. S.*, 76 S. Ct. 122. It will be noted that majority in the *Dalehite* case are now the minority. Mr. Justice Jackson wrote the majority opinion. Following this trend, the court in *Dahlstrom v. U. S.*, (C A 8) 24 L. W. 2312 (Jan. 1956) again questions the “Discretionary” rule.

The liability here would appear to be based upon the “operational level” of governmental activity as defined in the *Indian Towing Co.* case (*supra*).

The trial judge found that appellant was negligent in

failing to warn persons coming in contact with the bomb, either by markings, signs or other means (R. 13). He further found the government was negligent in dropping this type of bomb especially, in an area outside a target range (R. 14). These findings conform to the evidence and should be sustained.

No claim is made by Appellees that the government was negligent in undertaking the training program, but this immunity was not unlimited license to carry it on in an unreasonable manner.

IV. THE GOVERNMENT'S ACTION WAS THE PROXIMATE CAUSE OF THESE INJURIES.

A. APPELLEE'S INJURIES WERE FORSEEABLE.

Conceivably it can make no difference to the government's responsibility as to whether these bombs were dropped on the Livengood farm, the Coffey farm, or in the Osborne's back yard. By dropping this harmless appearing object on other than a government reservation, a reasonable person would be bound to anticipate that such a situation would occur. By placing this instrument in the hands of civilians it was just a matter of letting nature take its course until someone was injured. The ditch rider was lucky. The bombs he cut up for washers had been exploded. The landowner was also lucky. He had no occasion to use any lead. The lapse of time is insignificant

and cannot logically be used as a cushion for escaping liability.

The rule of foreseeability is really a test of the reasonableness of the consequence. The following comments are made in 38 Am. Jur. 706-707:

“Thus a liability arises if the injurious result of the negligent act was ‘such as might probably ensue in the natural and ordinary course of events;’ or such as, according to common experience, was likely to result; or such, as, according to common experience and the usual course of events, might reasonably have been anticipated.”

“An injury is deemed the natural and probable result of a negligent act if after the event, the viewing therefrom in retrospect to the act, the injury appears to be the reasonable rather than the extraordinary consequence of the wrong.”

“Even where the test is applied in determining proximate cause, it is weakened, if not made entirely a mere play upon words, by the rule that it is not necessary that the wrongdoer should anticipate the precise injury, and by the rule which attributes to him foresight of the disaster consequent upon his negligence.”

B. THE OSBORNES' ACTIONS DO NOT RELIEVE APPELLANT FROM LIABILITY.

There is no evidence to support Counsel's assertion that the removal of the bomb was tortious (App. Br. 37). This imports a wrongful taking from the possession of another, elements not present here.

Where the intervening act is reasonably foreseeable, the claim of proximate causation is not broken. In *Eckerson v. Fords Prairie School District No. 11*, 3 Wn. (2d) 475, 101 P. (2d) 345, the negligence of the defendant in leaving a stairway in a dangerous condition subjected it to liability even though the injured party was pushed by the tortious act of another; the court quoting from A.L.I. Restatement 1184:

“If the efforts of the actor’s negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person’s innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability.”

And again from the Restatement page 1202:

“If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.”

In *Swanson v. Gilpin*, 25 Wn. (2d) 147, 169 P. (2d) 356, a pedestrian was struck by a car when crossing the road in front of an illegally parked car. It was held that the pedestrian could recover against the owner of the parked car and the tortious act of the operator of the other car was foreseeable and not an intervening cause.

The case of *Cook v. Seidenverg*, 36 Wn. (2d) 256, 217 P. (2d) 799, does not in any way detract from this rule.

See *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 157, 108 Pac. 140, where it was said:

“The act of an intervening third party, contributing to the injurious result of the original negligence. does not, in all cases, excuse the original wrongdoer. If such intervening act could, or in the exercise of ordinary prudence should, have been foreseen, the original act still remains the proximate cause of the injury . . . ”

And also it was held in *Mathis v. Granger Brick and Tile Co.*, 85 Wash. 634, 643, 149 Pac. 3:

“It would be to eclipse the duty of one who knows of the dangerous character of an agency to control it, by magnifying the innocent failure of another to imagine a danger of which she had no knowledge, into a positive duty to know and avoid it. It would miss entirely the basic principle of the exercise of due care which measures the duty by the magnitude of the danger reasonably to be anticipated by one possessed of the knowledge necessary to foresee it.”

C. APPELLEE WAS NOT CONTRIBUTORILY NEGLIGENT.

No amount of argument can serve as a substitute for an examination of the bombs in this case (Ex. 1, 2, 9, 10, 11). As the trial judge observed, he, himself, had been in two world wars and yet the object did not appear dangerous to him (R. 233). Arguably, it would be negligent conduct to treat a bomb as this was handled but this

was a normal way to treat a lead object. No one could hold Appellee negligent without first finding that he knew or had a chance to know the hidden nature of the lead.

CONCLUSION

The trial court heard the testimony and observed the witnesses. He concluded Appellee was entitled to recover. His findings are supported by the evidence and the judgment should be affirmed.

Respectfully submitted,

POWELL & LONEY

By: Dean W. Loney

Attorneys for Appellants

No. 14836

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

ELMER G. COFFEY AND MRS. ELMER G. COFFEY,
HUSBAND AND WIFE, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is submitted, first, to apprise the Court of a pertinent Fourth Circuit decision, rendered after our main brief was filed in the present case, and second, to refute appellees' unwarranted attack upon our Statement of the Case.

I

In an opinion dated December 21, 1955, the Fourth Circuit affirmed a judgment for the United States in *Porter v. United States*, — F. 2d —. That case is like those discussed in our main brief at fn. 7, pp. 25-26,¹

¹ Hereinafter we shall refer to our main brief as "U. S. Br.", and to appellees' brief as "App. Br."

where the courts properly have refused to impose liability in a situation in which the claimant's proof establishes an accident but, except through conjecture or speculation or by piling inference on inference, fails to establish negligent conduct or scope of employment, as required by the Tort Claims Act.

Porter was an action by a soldier to recover damages sustained by his son when a hand grenade fuse of army origin, which the boy found near his home, exploded in his hand. The Porters lived in a civilian settlement about a mile from an active military reservation. The settlement was on property which formerly had been part of the reservation but which, some years before the accident, had been turned back to private ownership. The boy found the fuse at a nearby garbage dump. Alleging negligence of the Army in its custody of explosives, plaintiff introduced evidence that explosives had been found at the same spot previously, that, after it was notified, the Army investigated the area, found some explosives and destroyed them, but nevertheless military trucks were subsequently seen dumping trash there. There was no direct evidence that the trucks ever dumped explosives or that the drivers were on active duty at the time. The Government's evidence showed that training of soldiers under simulated battle conditions was conducted at the army post and that, despite precautions, persons living in the area would enter on the range and gather exploded or live ammunition; they would remove and sell the brass and other metals, and then discard the remainder. The plaintiff's argu-

ments were much like those advanced by appellees here, *viz*, that since the grenade was military in origin, it could not get to the dump without negligence, that it must be assumed there was negligence either in the dumping or in permitting the fuse to escape official custody, that Army negligence is the only reasonable explanation for the presence of the fuse at the place it was found, etc. The district judge, however, held that plaintiff had failed to meet his burden of proof with this meager evidence, indicating that it would be necessary to pyramid inference on inference to conclude that placing the fuse at the dump was the result of negligence of Army personnel who were acting within the scope of their employment. The district court opinion, relying primarily on *Rolon v. United States*, 119 F. Supp. 432 (D. C. P. R.), is reported at 128 F. Supp. 590.

The Court of Appeals affirmed, citing *United States v. Inmon*, 205 F. 2d 681 (C. A. 5), and *Rolon v. United States*, *supra*. Our main brief in the instant case referred to *Inmon* a number of times (U. S. Br. 17-19, 33), and discussed *Rolon* also (U. S. Br., fn. 7 at p. 25, and see pp. 17, 20, 23).

Factually, the *Porter* case is closely parallel to the case at bar. In both, a person was injured with an explosive object which unquestionably was military *in origin*. In both, the object was found not far from a military base. In both, the claimant failed to offer any direct proof of any negligent conduct by military personnel, while acting in their course of employment, which resulted in placing the object where it was found.

If anything, the *Porter* case is stronger for the claimant than this one, because unlike the present case, there the claimant was able to show that the Army had prior knowledge that explosives had been found at the very spot where the grenade was later picked up, and that military trucks were seen dumping trash in that specific dump. Nonetheless, both the district court and the Fourth Circuit held that the claimant could not meet his essential burden without piling inference on inference. The same is true in this case. As in *Porter*, this case should be dismissed because appellees failed to establish the factual elements which are conditions precedent to recovery under the Tort Claims Act.

II

Appellees' brief disputes our Statement of the Case. Their brief begins with an assertion that our presentation of certain facts "tend [*sic*] to distort the actual evidence," and follows with a point heading that certain of our statements of fact "are not supported by the evidence" (App. Br. 2, 4). Appellees then make reference to ten different statements in our Statement of the Case and argue that they are distortions and that they lack evidentiary support. The fact is, however, that, with possibly a single exception, every one of their challenges is thoroughly unwarranted and stems either from a misreading of our brief or from an over-zealous advocacy which ignores the Record references cited in our brief for each statement we made. While the Record will, of course, speak for itself, we believe it necessary to refute appellees' un-

justified attack on our Statement if only to avoid the possibility of their arguing that our failure to deny is acquiescence. We shall treat each item as summarily as we can:

1. Appellees challenge our statement (U. S. Br. 3), made with reference to the area around the Coffey, Waggoner and Livengood Ranches, that, "While some farming was done there, the area near the gulley was rough, rocky, and hilly terrain (R. 23)." The testimony of Oliver Osborne, describing the 1½-2-mile walk from the Coffey Ranch to the gulley, is: "Q. Can you describe, oh, the land that you were walking on, the kind of terrain you were on? A. Rough, hilly terrain, I would say. Q. Rocky? A. Fairly rocky, yes. Q. Was it being farmed around here? A. Yes." R. 23. We suggest that our statement is neither a distortion nor without support in the evidence.

2. Appellees challenge our statement (U. S. Br. 4) that Albert Osborne testified he had worked in the locality during some of the years between 1942-1948, that he knew the Navy had used "some of the general area for bombing ranges at that time," and that he was aware that the Navy had posted "Keep Off" signs near the ranges, citing R. 47-8, 52. The record supports that statement except that appellees may perhaps be correct in raising a question whether the signs he saw were at the ranges or at the airport. For, Osborne testified that "most" of the areas where he had been were airplane landing and take-off areas.

R. 47-8.² As to our statement that Osborne knew of bombing in the "general area," his testimony was that he had heard of the Zillah Bombing Range and—regardless of the physical geographical facts—he thought that the location of the town of Zillah in relation to the Coffey farm "*would be close*, but I doubt if it is ten miles [from the Coffey farm]. I think it is a *little* farther than that" (R. 52, emphasis added). We suggest, therefore, that our statement is not a distortion, but is a fair appraisal of the evidence.

3. Appellees (App. Br. 4) refer to pp. 4, 5 of our brief and say: "The sweeping statement is made that either Mr. Osborne or Appellee Coffey knew about bombing ranges in the general area or the possibility of bombs in the area." Our brief has no such statement. See item 2, above, for substantiation of what we did say as to Osborne. As to Coffey, our brief states: "While he later heard that there had been warnings publicized about the possibility of bombs in the area, he never heard about it before the accident, and he denied even knowing that there had been a bombing range in the area (R. 148-9)." U. S. Br. 5. We suggest that if there is distortion here, it lies only in what appellees said was in our brief.

4. Appellees (App. Br. 5) challenge our statement (U. S. Br. 4-5) as to the Osbornes' testimony that they "did not recognize the objects to be bombs (R. 24-25),

² Captain Smith, however, testified unequivocally that, in accordance with instructions from the Chief of Naval Operations, the bombing ranges were posted with signs and were fenced with barbed wire (R. 199-200).

although in broad form they were similar to a bomb or dud which they knew appellee Coffey kept in his home (R. 49).” The testimony: “Q. In other words, it is about the same shape as Mr. Coffey’s dud bomb that he has home? * * * A. If you are going to get real technical, I am going to say no, because the other one was a more spherical shape and longer and larger, and I think the other one has a corrugation on it. Q. I see. But they are very similar? A. In a way, yes. Q. In a way? A. Broad form, yes.” R. 49. Thus, again, the record supports our brief.

5. Appellees (App. Br. 5) seem to challenge our statement (U. S. Br. 6) as to Coffey’s testimony that he told his friend that the object “would have to be cleaned before putting it in the melting pot * * * [otherwise] ‘you will have a small explosion’ (R. 133-4),” and our statement (U. S. Br. 38) that he feared it would explode if it were put in the pot “in its raw state.” The testimony appearing at R. 133-4 is almost identical with what we said.

6. Appellee’s (App. Br. 6-7) challenge our statement (U. S. Br. 7) that the bomb is used only in horizontal bomb practice. The testimony of Chief Warrant Officer Dickey (R. 157 *et seq.*),³ who is an ordnance expert, and of Capt. Smith (R. 191-2, 208

³ R. 157-8: “* * * A. It is to be dropped from horizontal aircraft at 6,000 feet or above * * *. Q. I see. Is it used in other types of drops, that is, dive bombing or skip bombing, that type of bombing? A. No, it cannot be, due to the fact that it would be, as in this case, it would be a dud, is what we call a dud. * * *”

et seq.),⁴ who had been in charge of the Pasco Air Station, as well as the Navy's technical manual (R. 162), fully confirm our statement. There certainly is no distortion.

7. Appellees (App. Br. 6) challenge our statement (U. S. Br. 7) that during the war years, the bombing area was enclosed by barbed wire fencing and warning signs were posted at intervals of about 200 feet. Here, again, the testimony at R. 199-200 is precisely as we stated it.⁵

8. Appellees (App. Br. 6) challenge our statement (U. S. Br. 8) that no violation of Navy Regulations prohibiting the dropping of ordnance anywhere except in approved areas was ever reported to Naval authorities. Appellees say the only evidence is that Captain Smith never heard of any violation. Ap-

⁴ R. 192: "Q. * * * were the activities in that area [Pasco] confined to dive bombing or skip bombing? A. Oh, yes, dive bombing and skip bombing. Q. Out of the Pasco Naval Air Station, were any level flight missions flown? A. Not for the purpose of dropping bombs. * * * Q. Showing you Defendant's Exhibit 12, was this type of bomb used? A. *It was not.* Q. It was not used in the Pasco operations at all? A. *No, sir.*" [Emphasis added.]

⁵ R. 199-200: "Q. * * * Now, Captain, in regard to these bombing areas, were any safety precautions taken as to the areas themselves? A. Yes, they were posted, in accordance with instructions from the Chief of Naval Operations, and they were fenced, all of them were fenced with 3-strand barbed wire fence. Q. What did these regulations require as to posting and fencing? A. I don't remember at this time what the interval was that we posted around there. Q. To the best of your recollection, what was the interval? A. I would say it must have been around 200 feet, but I can't guarantee that. Q. Were these operations carried out in respect to these areas? A. Yes, sir."

pellees ignore Captain Smith's further testimony that if any violations had been reported, they would have come to his attention because of the position he held (R. 199).

9. Appellees (App. Br. 7) challenge our statement that McKnight found bombs or fragments "within an area of some 3 acres on the Livengood property" (U. S. Br. 9) and that he found these in the general vicinity of the place in which the Osbornes picked up the objects (U. S. Br. 20). Appellees say that the testimony "conclusively shows" that all were found "in the same place." We think our statement is a more objective characterization of the evidence (R. 102-104) than appellees'; theirs is argumentative and conflicts with the testimony of Oliver Osborne (R. 33) that there were no other objects near the ones he and his brother found.

10. Appellees' discussion (App. Br. 7-8) of the expert testimony concerning the markings on the various bombs and fragments is plainly argumentative rather than a challenge of the particular statement we made in our Statement of the Case (U. S. Br. 10) which did not deviate from the Record. Reference to the Record shows clearly that the expert testimony concerning the objects found by the Osbornes and concerning those found by McKnight was in fact different. See U. S. Br. 9-10, and fn. 5 at p. 21.

Whatever may be said about the conclusions that counsel may wish to deduce from the total of the evidence introduced, there can be no obscurity as to what the witnesses did or did not say. We believe

the Statement of the Case in our main brief is a fair paraphrasing of the testimony given, that it contains no distortion, and that it is amply supported by Record citations. Appellees' attack on our Statement is without merit and serves only to becloud the principal issue which is whether appellees introduced any evidence which establishes that the injuries were caused by negligent conduct of federal employees while acting within the scope of their employment. For this appellees rely on double and triple inferences, speculation and guesswork. Legal liability, we submit, should rest on a firmer base than that.

CONCLUSION

For the reason stated in our main brief, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and to enter judgment for the United States.

WARREN E. BURGER,
Assistant Attorney General,
 WILLIAM B. BANTZ,
United States Attorney,
 PAUL A. SWEENEY,
 LESTER S. JAYSON,
Attorneys, Department of Justice.

FEBRUARY, 1956.

United States
Court of Appeals
for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORT-
LAND, a National Banking Association,
Appellant,

vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of
the Estate of Northwest Variety Wholesale,
Inc., Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

No. 14837

United States
Court of Appeals
for the Ninth Circuit

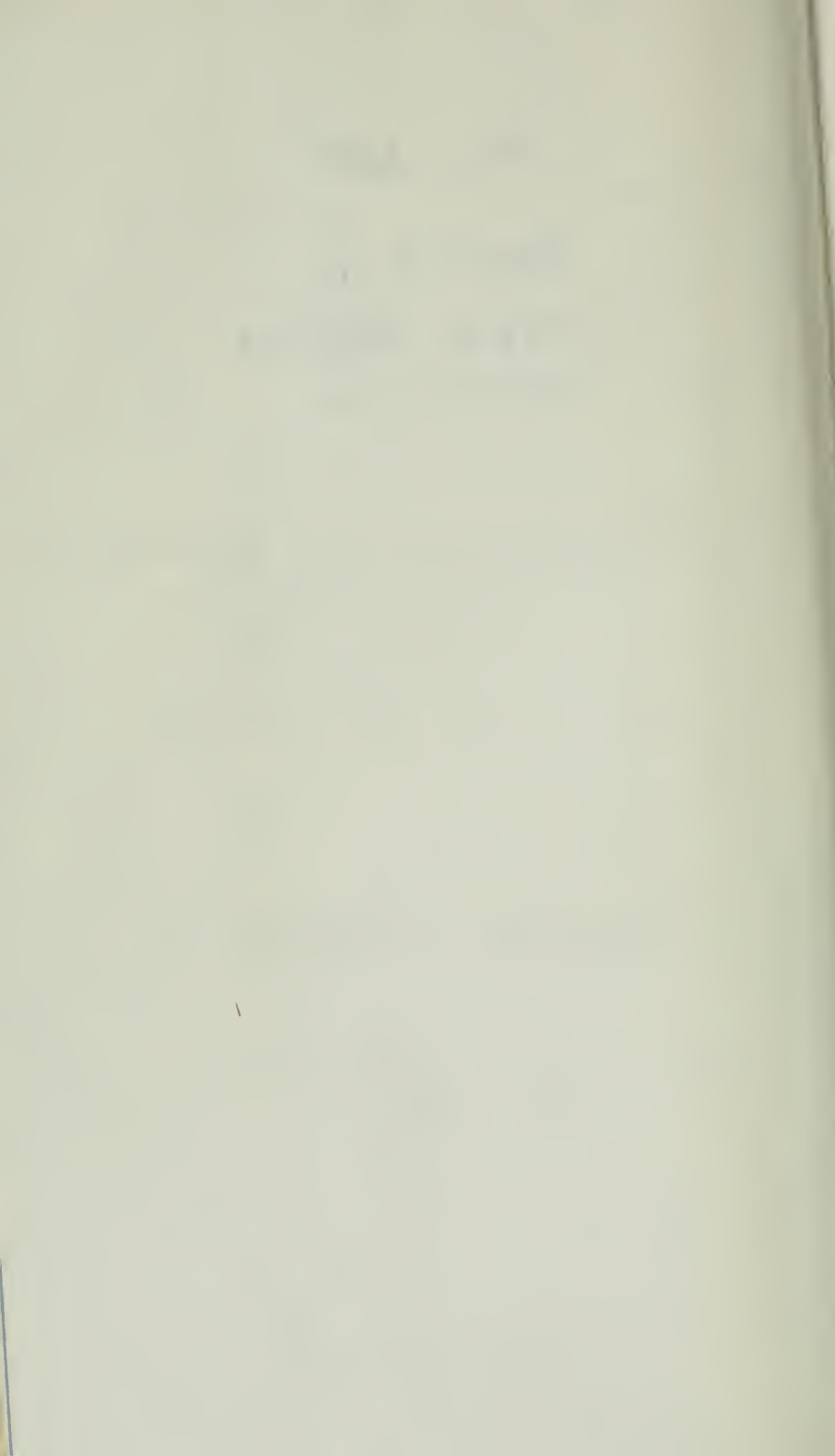
THE FIRST NATIONAL BANK OF PORT-
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vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of
the Estate of Northwest Variety Wholesale,
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland, Oregon,

For Appellant.

EDWARD A. BOYRIE,

Pittock Block,
Portland, Oregon,

For Frank A. Dudley, Trustee in
Bankruptcy, Appellee.

In the District Court of the United States for the
District of Oregon

No. B-33752

In the Matter of the Petition of NORTHWEST
VARIETY WHOLESALE, INC., Bankrupt.

CLAIM OF THE FIRST NATIONAL BANK
OF PORTLAND—Amount \$8,184.19

State of Oregon,
County of Multnomah—ss.

Oscar H. Keller, of Portland, in the County of
Multnomah, State of Oregon, being duly sworn,
deposes and says:

That he is the Executive Vice President and
Cashier of The First National Bank of Portland,
a national banking association, with its principal
place of business at Portland, County of Multno-
mah, State of Oregon, and is duly authorized to
make this proof of claim on its behalf.

That Northwest Variety Wholesale, Inc., the
above named bankrupt, was at and before the filing
by it of the petition for adjudication of bankruptcy,
and still is, justly and truly indebted to said cor-
poration in the sum of \$8,184.19.

That the consideration of said debt is as follows:
money loaned to said bankrupt and evidenced by a
certain promissory note in the original amount of
\$22,000, which note is attached hereto and by this
reference incorporated herein. Request is made for

permission to withdraw said original note and substitute a photostatic copy thereof.

That nothing has been paid to apply upon the said debt, except \$11,000 principal and interest to May 26, 1953, on and prior to said date and the further sum of \$73.33 interest and \$2,815.81 principal on July 13, 1953 by exercise on that date of claimant's right of set off against the commercial account of said bankrupt maintained subject to check by said bankrupt in the regular course of its business; that there are no set offs or counterclaims to said debt.

That said corporation does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt.

/s/ OSCAR H. KELLER

Subscribed and sworn to before me this 29 day of July, 1953.

[Seal] /s/ C. E. ZOLLINGER,
Notary Public for Oregon

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO ALLOWANCE
OF CLAIM OF THE FIRST NATIONAL
BANK OF PORTLAND AND PETITION
FOR ORDER OF PAYMENT OF BANK
ACCOUNT OF TRUSTEE, AND ORDER
SETTING TIME FOR HEARING THERE-
ON

Comes now Frank A. Dudley, the duly appointed, qualified and acting Trustee of the estate of the above named bankrupt, and objects to the claim of The First National Bank of Portland filed herein as Claim No. 17 in the amount of \$8,184.19, on the following grounds:

1. On October 11th, 1952, the bankrupt executed and delivered to claimant its promissory note in the amount of \$22,000.00 payable thirty days after date with interest at the rate of 5%. Copy of said note is attached to claimant's claim herein.

2. During the month of November, 1952, the bankrupt was unable to meet its obligations in the regular course of business as they became due and was pressed by many of said creditors for payment of their accounts and was threatened by certain of said creditors with legal proceedings in the event of nonpayment of said accounts. The bankrupt conferred with and wrote to its creditors during the month of December, 1952, and advised said creditors substantially as follows: That in the Spring of 1952, upon the advice of a national firm of business consultants, it had increased its inventory far beyond its past normal business requirements;

that the promised sales promotion was not subsequently realized and that it found itself in the embarrassing position of having a much greater inventory than could be readily liquidated; that this was so because much of the inventory was in seasonal merchandise which would not be liquidated in an orderly manner in less than a full year's business cycle; that if the inventory had to be quickly liquidated considerable of it would have only salvage value; that its financial position was sound only so long as its inventory could be sold in a normal manner. The bankrupt at said time advised its said creditors that if permitted to continue operation it would liquidate all excess inventory in this manner and would pay all creditors in ten equal monthly installments, starting with January 15, 1953.

3. The foregoing circumstances and plan were imparted to and discussed by the bankrupt with claimant, The First National Bank of Portland, and the said bank agreed with the feasibility and advisability of putting the same into effect and agreed to accept the payments of ten per cent per month starting with January 15th, 1953, upon its promissory note. Other creditors of the bankrupt signified similar acquiescence and the said plan was put in effect. The bankrupt proceeded to liquidate its excess stock of merchandise and placed all monies realized from the sale thereof in its bank account at The First National Bank of Portland. The bankrupt drew checks upon said bank account and made payment to its creditors upon a pro-rata

basis of ten per cent of their respective accounts per month during the months of January, February, March, April and May, 1953. The claimant received and accepted its ten per cent monthly payments during said five months, which said payments are shown upon the copy of note attached to claimant's claim herein, and reduced the principal amount of said note to \$11,000.00. Other creditors of the bankrupt accepted like pro-rata payments and refrained from instituting any action against bankrupt for collection of their respective accounts.

4. At the time of the commencement of the within proceedings the bankrupt had on deposit in said bank account at The First National Bank of Portland the sum of \$2,815.81, which said sum the said bank then claimed the right to appropriate and set off against the unpaid balance of said note, thereby reducing the amount of same to \$8,184.19, in which amount the said bank has filed its claim herein.

5. Trustee asserts that the seizure of the balance of bankrupt's bank account in the amount of \$2,815.81 and the application of said amount upon the indebtedness owing to the bank was without legal right on the part of said bank and a misappropriation of monies payable to the Trustee, and that the Trustee is entitled to recover payment thereof of and from the said bank; that the bank had so dealt with the depositor as to waive or be estopped to assert its right of set-off which would otherwise exist; that the circumstances under which the bank account was created and the knowledge,

acquiescence and cooperation of the bank in the manner and purpose of the creation of said fund for the payment of creditors upon a pro-rata basis estopped the bank to assert a lien thereon, or the right of set-off for its own benefit.

Wherefore, Trustee prays that a time may be set for hearing of the foregoing objections and petition, and that upon hearing thereof the claim of said The First National Bank of Portland may be disallowed, unless, within a time to be set, the said bank shall pay over to the Trustee the said sum of \$2,815.81 appropriated by it from the bank account of the bankrupt as above set forth, and that the Trustee do have judgment against said bank for payment to the Trustee of said amount, and for such other, further and different relief as may be meet and equitable in the premises.

/s/ FRANK A. DUDLEY,
Trustee.

Duly Verified.

Order Setting Time for Hearing Thereon

Upon application of Edward A. Boyrie, of Attorneys for Trustee, and no adverse interests appearing;

It Is Ordered that the foregoing objections and petition be heard before the undersigned Referee of the above entitled Court in his court room, 512 United States Court House, Portland, Oregon, on the 13th day of September, 1954, at the hour of 2:00 o'clock p.m.

It Is Further Ordered that service of the within objections and order setting time for hearing thereon be made by mailing a copy thereof to The First National Bank of Portland, Main Branch, Attention Clifford E. Zollinger, S. W. Fifth, Sixth and Stark Street, Portland, Oregon.

Dated this 13th day of August, 1954.

/s/ ESTES SNEDECOR, Referee

MEMORANDUM

The Trustee contends that the facts of this case as they will be disclosed by evidence to be submitted by Trustee and claimant are such as bring the instant case within the rule laid down by the U. S. Court of Appeals, Ninth Circuit, in the case of Union Bank & Trust Company of Helena, Montana, vs. Lester H. Loble, Trustee, 20 F.(2d) 124, 10 A.B.R. (N.S.) 350.

The following is quoted from the case referred to:

"But a bank may so deal with a depositor as to waive or be estopped to assert the right of set-off. *Michie, Banks and Banking*, 1027. And the right does not exist where the circumstances are inconsistent with its exercise. *Neponset Bank vs. Leland*, 5 Metc. (Mass.) 259; *Reynes vs. Dumont*, 130 U.S. 354, 9 S. Ct. 486, 32 L. Ed. 934. Nor where the principles of legal or equitable set-off do not authorize it. *Wagner vs. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S. W. 245, 28 L.R.A. (N.S.) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483; *Furber vs. Dane*, 203 Mass. 108, 89 N. E. 227; *Lyman vs. Bel-*

fast Nat. Bank, 98 Me. 448, 57 A. 799; *In re Davis* (D. C. Tex.), 9 Am. B. R. 670, 119 F. 950. On these grounds we think the decision of the court below is sustainable. While the money realized on the special sale and deposited to the bankrupt's current account and subject to its checks for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off, we are inclined to the view that the circumstances under which the fund was created, and the co-operation of the bank and the bankrupt in its creation, were sufficient to so far impress upon it the character of a trust fund that the bank should be held estopped to assert a lien thereon or the right of set-off.

Applicable to the case is the language of the court in *Union Trust Co. vs. Peck* (C.C.A., 4th Cir.), 9 Am. B. R. (N.S.) 127, 16 F.(2d) 986:

'It is, moreover, to be noted that, before and at the time the bank applied these amounts to its own use, it, the bankrupt, and the other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously not made in ordinary course, in any fair sense of that phrase. Most men would feel that it is

an implied term of such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien.' ”

Respectfully submitted,

/s/ EDWARD A. BOYRIE,
Attorney for Trustee.

[Endorsed]: Filed August 13, 1954.

[Title of District Court and Cause]

ANSWER TO TRUSTEE'S OBJECTIONS TO
ALLOWANCE OF CLAIM OF THE FIRST
NATIONAL BANK OF PORTLAND

Comes now The First National Bank of Portland, a national banking association, claimant herein, and in answer to the Trustee's Objections to the allowance of its claim admits, denies and alleges as follows:

1. Admits Paragraph 1 of Trustee's said Objections.

2. In answer to Paragraph 2 of Trustee's said Objections, admits that it was requested by the Bankrupt to enter into an agreement to accept payments of not less than ten per cent of the obligation owing it, the first payment to be made in January, 1953, and a like payment to be made each month thereafter for ten consecutive months or until the full balance owing had been paid; denies

that it received the letter to which reference is made in Paragraph 2 at line 21 of said Objections or any letter of similar import, and denies having knowledge or information sufficient to form a belief as to the truth of the allegations made in Paragraph 2 of said Trustee's Objections, except as hereinabove admitted.

3. In answer to Paragraph 3 of said Objections, denies that it agreed to accept payments of ten per cent of the obligation owing it by the Bankrupt, the first payment to be made in January, 1953, and a like payment in each month thereafter for ten consecutive months or until the full balance owing was paid; admits that it received and accepted payments in the aggregate amount of \$11,000.00 to apply upon the principal balance owing it, composed of five equal payments of \$2200.00 each, and that the principal amount of the obligation owing it was reduced to \$11,000.00; and denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph 3 except as hereinabove admitted.

4. Answering Paragraph 4 of said Objections, admits the allegations therein contained.

5. Answering Paragraph 5 of said Objections, denies each and every allegation, statement, matter and thing therein contained, generally and specifically, and the whole thereof.

As affirmative matter and in explanation and support of its right of set-off herein, The First National Bank of Portland, creditor herein, alleges:

1. In the latter part of December, 1952, Mr. D. E. Ankron, Manager of the Bankrupt, advised the Bank that the Bankrupt was being pressed for payment by its creditors and asked if the Bank would agree to accept not less than ten per cent of the obligation owing it, the first payment to be made in January, 1953, and like payments of not less than ten per cent of the principal amount of the obligation, or \$2200.00, each month thereafter until the full amount owing was paid. Mr. Ankron advised the Bank that the Bankrupt was making the same request of each of its creditors.

The Bank refused to agree to the proposal as advanced by Mr. Ankron, but it did state that it would accept the proposed payments on a month to month basis, reserving all of its rights and remedies against the Bankrupt, and particularly the right to take such action at any time as it might deem appropriate to effect the full collection of the obligation owing it.

2. In December, 1952, the note of the Bankrupt payable to the order of The First National Bank of Portland, a photostatic copy of which is in the files of this matter, was in default, due, owing and unpaid.

3. On or about July 2, 1945, the Bankrupt, then Northwest Buyers, Inc., duly, regularly and by appropriate resolution, opened a commercial account at the Industrial Branch of The First National Bank of Portland, which said account was maintained by it and continually used by it until on or about July 9, 1953. During the latter half of De-

cember, 1952, the balance of said account ranged from \$16,114.98 to \$22,301.09. The Bank could have exercised the right to set off the amount in the said commercial account of the Bankrupt against the sums owing the Bank at any time after November 12, 1952, at which time the above described promissory note was in default, due, owing and unpaid.

4. On July 7, 1953, The First National Bank of Portland was advised that the Bankrupt was preparing and would file a voluntary petition in bankruptcy. Thereafter the Bank exercised its right of set-off of the sum of \$2815.81 against the sum of \$11,000.00 then due and owing from the Bankrupt.

Wherefore, The First National Bank of Portland prays that the Trustee's Objections to the allowance of its claim herein be dismissed, that its claim as hereinabove filed be allowed, and that its exercise of its right of set-off in the amount of \$2815.81 against the balance owing to it at the time of the set-off be confirmed.

THE FIRST NATIONAL BANK
OF PORTLAND,

/s/ By C. E. ZOLLINGER,

Vice President.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

ORDER DISALLOWING CLAIM

The within matter came on for hearing before the undersigned Referee of the above entitled Court on the 13th day of September, 1954, upon trustee's objections to allowance of claim of The First National Bank of Portland and the answer of The First National Bank of Portland thereto. Trustee appeared by his attorney, Edward A. Boyrie, and claimant, The First National Bank of Portland, appeared by W. H. Pendergrass of Messrs. Pendergrass, Spackman and Bullivant, its attorneys. Witnesses were sworn and testified, and documentary evidence introduced and received. After consideration of said evidence, and written and oral argument on behalf of the trustee and of said claimant, the Court being fully advised in the premises finds:

1. That on October 11th, 1952, the bankrupt executed and delivered to claimants its promissory note in the amount of \$22,000.00 payable 30 days after date with interest at the rate of five per cent, copy of which note is attached to claim of The First National Bank of Portland filed herein as Claim No. 17 in the amount of \$8,184.19.

2. That during the months of November and December, 1952, the bankrupt was indebted to The First National Bank of Portland in the principal amount of said promissory note together with the interest thereon, and The First National Bank of

Portland was at said time the largest creditor of the bankrupt.

3. That during the month of November, 1952, the bankrupt became unable to meet its obligations in the regular course of business as they became due, and by its president and its attorney advised said bank that it found itself in this condition, but that it had a stock of merchandise which could be sold to advantage over a period of time so as to liquidate the indebtedness owing by the bankrupt corporation; that the bankrupt proposed to said bank that if the creditors, including said bank, would refrain from seeking immediate payment of their respective accounts in full, the bankrupt would proceed to liquidate its inventory over a period of twelve months time and would pay to the bank, as well as to other creditors, a quarterly payment of twenty-five per cent of the indebtedness owing to the bank and to such creditors, the first of said payments to be made on January 15th, 1953.

4. That the bank proposed a modification in said plan whereby, instead of quarterly payments of twenty-five per cent over a twelve months period of time, monthly payments of ten per cent would be made to creditors commencing with the month of January, 1953.

5. That as so modified, the bank agreed that the plan was a feasible one, which should enable the bankrupt to work out of its financial difficulties, and that the bank would go along with the bankrupt on the plan and refrain from pressing for

immediate payment in full of the indebtedness due it, providing that the monthly payments of ten per cent were made.

6. That the bankrupt advised its other creditors of said plan and advised a number of said creditors of the approval of said plan by the bank and the participation of the bank therein, and obtained the participation of its other creditors in said plan, with the result that the bankrupt was permitted to continue in business and proceeded to liquidate its inventory in accordance with the plan, and to make the ten per cent payments monthly to each of its creditors during the months of January, February, March, April and May, 1953.

7. That in 1946 the bankrupt opened with The First National Bank of Portland a general commercial account in which unrestricted deposits were made subject to withdrawal by check in the ordinary course of business. This account was in existence at the time of the creation of the loan upon which the claim of the bank is based and continued in existence without change, except as to the amount thereof, to and including the date of the exercise by said Bank of its asserted right of off-set. The activity in the account and the high and low monthly balances for the period from January, 1951 through June, 1953, are shown in Exhibit 5, which is included by reference herein as a part hereof. The deposits in and withdrawals from the account and the balances after each daily transaction in the account for the period of from November 29, 1952,

until the account was closed, are shown in the copies of the bank statements which are Exhibit 6, and which is included by reference herein as a part hereof. After the formulation of the plan referred to in paragraphs 2, 4, 5 and 6 above, the bankrupt deposited all monies realized from the sale of its inventory in its bank account at The First National Bank of Portland and drew checks upon said bank account in payment of its operating expenses and made payment to its creditors by checks upon said bank account, upon a pro-rata basis of ten per cent of their respective accounts during the months of January, February, March, April and May, 1953. During said period the bank had knowledge that the plan was in progress, that the bankrupt was operating thereunder, and that all of the creditors of the bankrupt had acquiesced in said plan and were receiving their monthly ten per cent dividends thereunder. At the time of the commencement of the within proceedings there remained in said bank account a balance resulting from said deposits in the amount of \$2,889.14.

8. That the claimant, The First National Bank of Portland, received and accepted monthly payments of ten per cent of the principal of its note together with accruing interest in full during said five months, which said payments are shown upon the copy of said note attached to claimant's claim herein, and reduced the amount of said note to \$11,000.00; that the other creditors of the bankrupt received and accepted monthly payments of ten per

cent of their accounts, reducing their respective claims accordingly.

9. On June 20th, 1953, the bank received information indirectly that the debtor company, Northwest Variety Wholesale, Inc., was considering bankruptcy. On July 7th, 1953, counsel for the bankrupt advised the bank that he was preparing a petition in bankruptcy to be filed as soon as the inventory could be completed. The petition in bankruptcy was filed on July 13th, 1953, at which time the bankrupt had on deposit in its said account at The First National Bank of Portland the sum of \$2,-889.14. On July 14th, 1953, the bank offset this amount against its indebtedness, thereby reducing the amount of same to \$8,184.19, in which amount the said bank has filed its claim herein; that other creditors of the bankrupt have filed their claims herein covering the balances due them after application of the five monthly payments of ten per cent as made to them under the plan of liquidation above referred to.

Upon the foregoing findings the Court concludes:

1. That by its approval of the bankrupt's plan of payment of its creditors upon a pro-rata basis and by its participation therein, the bank so dealt with its depositor, the bankrupt, and with other creditors of the bankrupt as to waive or be estopped to assert the right to set off of the deposits made by the bankrupt against the indebtedness owing to the bank.

2. That the bank account of the bankrupt as it existed at the time of the commencement of the within bankruptcy proceedings was created under such circumstances, with the cooperation of the bank and the bankrupt, as to so far impress upon it the character of a trust fund, that the bank should be estopped to assert a lien thereon or the right of set off.

3. That the claim of The First National Bank of Portland, as filed herein, should be disallowed unless the said sum of \$2,889.14, appropriated by said bank from the bank account of the bankrupt, be surrendered to the Trustee.

Now, Therefore, It Is Ordered that the claim filed herein by The First National Bank of Portland in the amount of \$8,184.19 be, and the same is hereby disallowed, unless said The First National Bank of Portland surrender and pay over to said trustee the sum of \$2,889.14 within twenty days from the date hereof.

Dated this 15th day of February, 1955.

/s/ ESTES SNEDECOR,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 15, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER BY JUDGE

Petitioner is a creditor of the above named bankrupt and has filed its claim herein in the amount of \$8,184.19.

On August 13, 1954, Frank A. Dudley, Trustee of the estate of the above named bankrupt, filed his objections to the allowance of the claim of Petitioner and requested an order setting the time and place for the hearing of said objections. The objections came on for hearing on September 13, 1954, Trustee appearing by his attorney, Edward A. Boyrie, and Petitioner appearing by Walter H. Pendergrass, of Pendergrass, Spackman & Bullivant, its attorneys. Thereafter on February 15, 1955, findings of fact and conclusions of law were filed and an order disallowing Petitioner's claim was entered, a copy of which findings of fact, conclusions of law and order is attached hereto and by this reference made a part hereof.

The order is erroneous for the following reasons:

1. The conclusion of law that the Bank waived its right to assert a set-off of the balance in the bankrupt's account against the bankrupt's indebtedness owing the Bank is not supported by the facts and is contrary to law.

2. The conclusion of law that the Bank so conducted itself as to be estopped to assert its right to

set-off the balance in the bankrupt's account against the indebtedness owing the Bank is not supported by the facts and is contrary to law.

3. The conclusion of law that the bank account maintained by the bankrupt with the Bank had, at the time of the exercise of the right of set-off, acquired the character of a trust fund and was therefore not available by the Bank to be set off against the bankrupt's indebtedness owing it is not supported by the facts and is contrary to law.

4. The conclusion of law that the claim of the Bank should be disallowed unless the sum of \$2,-889.14, which is the sum set off by the Bank against the bankrupt's indebtedness owing it, is surrendered to the Trustee is not supported by the facts and is contrary to law.

5. The evidence presented to the Referee, as disclosed by the transcript and exhibits in this matter, and the facts as found by the Referee, establish that the Bank was authorized by the applicable statutes and the cases construing the same to set off the balance in the general commercial account maintained by the bankrupt with the Bank against the indebtednesses owing by the bankrupt to the Bank.

Wherefore, Petitioner prays for a review of the said order by the Judge and that the said order be vacated and set aside, and for an order approving and allowing Petitioner's claim heretofore filed herein and confirming Petitioner's right to set off the balance in the general commercial account maintained by the bankrupt with the Bank on July 14,

1953, against the indebtedness owing by the bankrupt to the Bank.

THE FIRST NATIONAL BANK
OF PORTLAND,

Petitioner,

/s/ By C. E. ZOLLINGER,
Vice President.

[Order Disallowing Claim set out at pages 17-22
of this printed record.]

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 23, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON PETITION
of The First National Bank of Portland for
Review of the Referee's Order Entered February
15, 1955, Disallowing the Claim of the Bank

To the Honorable Judges of the Above Entitled
Court:

Estes Snedecor, the Referee in Bankruptcy in
charge of this proceeding, hereby makes this his
certificate on the petition of The First National
Bank of Portland for a review of the Referee's
order disallowing its claim unless the Bank shall
surrender and pay over to the trustee the sum of
\$2,889.14.

Questions Presented

The questions presented are set forth in the Peti-
tion for Review which accompanies this certificate.

Facts

The facts are undisputed and are set forth in the Referee's Order Disallowing the Claim of the Bank.

Papers Submitted

Transmitted herewith are the following papers:

1. Claim of The First National Bank of Portland.
2. Trustee's objections to allowance of claim of The First National Bank of Portland and petition for order of payment of Bank Account to trustee, and order setting time for hearing thereon.
3. Answer to trustee's objections to allowance of claim of The First National Bank of Portland.
4. Memorandum of The First National Bank of Portland.
5. Reply memorandum.
6. Order disallowing claim of The First National Bank.
7. Petition for review of Referee's order.
8. Transcript of testimony of hearing before the Referee September 13, 1954.
9. Trustee's Exhibit 1 and Claimant's Exhibits 2, 3, 4, 5 and 6.

Dated at Portland, Oregon, this 1st day of March, 1955.

Respectfully submitted,

/s/ ESTES SNEDECOR,
Referee in Bankruptcy.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Because I am not impressed as an original proposition that such a loose arrangement, as presented here, should work a loss of the bank's right of set-off, I have examined *Union Bank & Trust Co. vs. Loble*, 20 F.2d. 124 closely. The learned referee thought it was controlling; counsel for petitioner strongly urges that the present case and that case are distinguishable.

I do not feel that I should strain to distinguish the *Loble* case, and I will follow the view the referee took of it.

If, as appears to be the case, petitioner feels that the referee's decision (and my affirmance) will seriously affect banking practices, petitioner is in position to take the question to the Circuit Court. If that is done, I would suggest that the Circuit should not be limited, as the presentation before me was limited, to consideration only of the findings made by the referee.

Dated May 10, 1955.

/s/ CLAUDE McCULLOCH
Judge.

[Endorsed]: Filed May 10, 1955.

In the United States District Court for the District
of Oregon

In Bankruptcy—No. B-33752

In the Matter of NORTHWEST VARIETY
WHOLESALE, INC., Bankrupt.

ORDER ON PETITION FOR REVIEW
OF ORDER OF REFEREE

The within matter came on for hearing on the 26th day of April, 1955, upon petition of The First National Bank of Portland for review of Referee's Order made and entered in the within proceedings on the 15th day of February, 1955, disallowing petitioner's claim as filed in the within proceedings. Petitioner appeared by Walter H. Pendergrass of Pendergrass, Spackman & Bullivant, its attorneys, and Frank A. Dudley, trustee herein, appeared by his attorney, Edward A. Boyrie. The Court having heard argument of counsel and received and considered briefs filed herein, has heretofore under date of May 10th, 1955, found that the Order of the Referee should be sustained, and has filed its Memorandum of Decision herein;

Now, Therefore, It Is Ordered that the Order of the Referee made and entered in the within proceedings under date of February 15th, 1955, disal-

lowing the claim of The First National Bank of Portland, as filed in the within proceedings, be and the same is hereby affirmed.

Dated this 6th day of June, 1955.

/s/ CLAUDE McCULLOCH,
Judge.

[Endorsed]: Filed June 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

To: Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., a corporation, and Edward A. Boyrie, his attorney:

Notice is hereby given that The First National Bank of Portland, Claimant, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order of the Honorable Claude McCulloch, Judge of the District Court of the United States for the District of Oregon in the matter of Northwest Variety Wholesale, Inc., Bankrupt, dated June 6, 1955, and reading as follows:

“Now, therefore, it is ordered that the Order of the Referee, made and entered in the within proceeding under date February 15th, 1955, disallow-

ing the claim of The First National Bank of Portland, as filed in the within proceedings, be and the same is hereby affirmed."

Dated this 23rd day of June, 1955.

V. V. PENDERGRASS,

R. R. BULLIVANT,

WALTER H. PENDERGRASS,

Attorneys for Claimant The First
National Bank of Portland.

[Endorsed]: Filed June 23, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS

Know All Men by These Presents: That The First National Bank of Portland, a national banking association, as Principal, and C. B. Stephenson, as Surety, are firmly held and bound unto Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., its successors and assigns, in the sum of Two Hundred Fifty 00/100ths Dollars (\$250.00) lawful money of the United States to be paid unto the said Frank A. Dudley, as Trustee, his successors and assigns, to which payment well and truly to be made we do bind and oblige our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this — day of May, 1955.

Whereas the above named Frank A. Dudley, Trustee, filed an objection to the allowance of the claim of The First National Bank of Portland in the United States District Court in and for the District of Oregon, in Bankruptcy,

Now, Therefore, the condition of this obligation is that if the above named The First National Bank of Portland in the said action shall pay on demand all costs that may be adjudged or awarded against it in said action, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

THE FIRST NATIONAL BANK
OF PORTLAND,

/s/ By C. B. STEPHENSON,
President,

/s/ By R. G. ALBERGER,
Cashier,
Principal,

[Seal] /s/ C. B. STEPHENSON,
Surety.

State of Oregon,
County of Multnomah—ss.

I, C. B. Stephenson, being first duly sworn, depose and say:

That I am a resident and freeholder of the State of Oregon and worth the sum of Five Hundred 00/100th Dollars (\$500.00) over and above all my

just debts and liabilities in property not exempt from execution.

/s/ C. B. STEPHENSON.

Subscribed and sworn to before me this 20th day of May, 1955.

[Seal] /s/ W. H. PENDERGRASS,
Notary Public for Oregon.

[Endorsed]: Filed June 23, 1955.

[Title of District Court and Cause.]

STIPULATION FOR DESIGNATION OF RECORD ON APPEAL

Frank A. Dudley, Trustee of the Bankrupt Estate of Northwest Variety Wholesale, Inc., by Edward A. Boyrie, his attorney, and The First National Bank of Portland, a national banking association, Claimant, by Walter H. Pendergrass, of its attorneys, do stipulate and agree that the following listed documents shall be and they are designated as the Record on Appeal herein.

1. Claim of The First National Bank of Portland.

2. Trustee's Objections to Allowance of Claim of The First National Bank of Portland and Petition for Order of Payment of Bank Account to Trustee, and Order Setting Time for Hearing Thereon, filed August 13, 1954.

3. Answer to Trustee's Objections to Allowance of Claim of The First National Bank of Portland, filed September 3, 1954.

4. Transcript of Testimony of Hearing of September 13, 1954.

5. Trustee's Exhibit 1 and Claimant's Exhibits 5 and 6.

6. Order Disallowing Claim filed February 15, 1955.

7. Petition for Review of Referee's Order by Judge filed February 23, 1955.

8. Certificate of Referee on Petition of The First National Bank of Portland for Review of the Referee's Order entered February 15, 1955, Disallowing the Claim of the Bank, dated March 1, 1955.

9. Memorandum of Decision of the Honorable Claude McCulloch, Judge of the District Court of the United States for the District of Oregon, dated May 10, 1955.

10. Order on Petition for Review of Order of Referee, dated June 6, 1955, signed by Honorable Claude McCulloch, Judge.

11. Notice of Appeal filed June 23, 1955.

12. Bond for Costs on Appeal filed June 23, 1955.

13. Stipulation for Designation of Record filed June 24, 1955.

14. Statement of Points on Appeal filed June 24, 1955.

This stipulation is submitted pursuant to Rule 75(f) of Federal Rules of Civil Procedure.

Dated this 23rd day of June, 1955.

/s/ WALTER H. PENDERGRASS,
Of Attorneys for The First National
Bank of Portland, Claimant,
/s/ EDWARD A. BOYRIE,
Attorney for Frank A. Dudley,
Trustee

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss:

I, F. L. Buck, Acting Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of Claim of The First National Bank of Portland, Trustee's Objections to Allowance of Claim of The First National Bank of Portland, Answer to Trustee's Objections to Allowance of Claim, Trustee's Exhibit No. 1, Claimant's Exhibits Nos. 5 and 6, Order Disallowing Claim, Petition for Review of Referee's Order, Certificate of Referee on Petition for Review of the Referee's Order, Memorandum Decision of The Hon. Claude McColloch, Order of The Hon. Claude McColloch, Notice of Appeal, Bond on Appeal, Statement of Points on

Appeal and Stipulation for Designation of Record on Appeal, constitute the record on appeal from an order of said court in a certain bankruptcy cause therein numbered B-33752, In the Matter of Northwest Variety Wholesale, Inc., in which The First National Bank of Portland is appellant, and Frank A. Dudley, Trustee in Bankruptcy, is appellee; that the said record has been prepared by me in accordance with the stipulation for designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that I am sending with the said transcript of record a copy of the reporter's transcript of testimony dated September 13, 1954, and

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 15th day of July, 1955.

[Seal] F. L. BUCK,
 Acting Clerk,
/s/ By E. W. DAVIS,
 Deputy Clerk.

In the District Court of the United States for the
District of Oregon

In Bankruptcy—No. B-33752

In the matter of NORTHWEST VARIETY
WHOLESALE, INC., Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Portland, Ore., Sept. 13, 1954, 2:00 p.m.

Be it remembered that, on this 13th day of September, 1954, at the hour of 2:00 p.m. thereof, the hearing on Trustee's objections to allowance of claim of The First National Bank of Portland and petition for order of payment of bank account to Trustee came regularly on for hearing before the Referee in Bankruptcy, the Honorable Estes Snedecor.

The Trustee appeared by Mr. E. A. Boyrie, his attorney; the claimant, The First National Bank of Portland, appeared by Mr. W. H. Pendergrass, of Messrs. Pendergrass, Spackman & Bullivant, its attorney.

Thereupon the following proceedings were had:

The Referee: All right, Gentlemen. Mr. Boyrie. We can get at the evidence as quickly as possible. I have read the pleadings on it.

Mr. Pendergrass: If the Court please, I have one correction to the pleadings. On Page 2 of our answer on Line 5 it reads "July 25th." It should be "July 26th."

Mr. Boyrie: Well, if it is agreeable to the Court

and counsel I will just put my testimony on. I don't think there is going to be a great deal of difference between the parties in the facts and the testimony. I think there will be some difference in emphasis perhaps and inferences, but basically I think we are not going to be widely divergent on the facts.

The Referee: It is largely going to be a question of law, isn't it?

Mr. Boyrie: Yes, sir.

The Referee: That is the way it appeared to me, but you may proceed with the evidence.

Mr. Boyrie: Mr. Baines.

ARTHUR B. BAINES

was thereupon produced as a witness in behalf of the Trustee herein, and, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boyrie): You acted as attorney for Northwest Variety Wholesale, Incorporated, in preparation of its petition in bankruptcy in this case, did you not? A. That is correct.

Q. And you prepared its schedules in bankruptcy? A. That is correct.

Q. And filed them. Had you been an attorney for the company before the preparation of these schedules in bankruptcy?

A. From its inception.

Q. And that would be from when, do you recall?

(Testimony of Arthur B. Baines.)

A. Oh, I think possibly 1948 or somewhere around there is when it was first organized.

Q. Let's go right down—these schedules were filed July 14, 1953. You acted as attorney for the corporation, then, in preparing its corporation papers and its charter? A. Yes, sir.

Q. And any services that were required afterwards in permission to sell stock and minutes and the like? A. Yes, sir, all of those.

Q. And the corporation continued in business up—let's come down to December, 1952. Can you tell us what condition developed with to the corporation in December, 1952?

A. Well, it was perhaps a month and a half before that, or two months, Mr. Boyrie, the corporation had prior to that time changed its operation from strictly a co-operative to more or less of a strictly wholesale variety stock upon the advice of this national firm of business consultants.

Then in the fall of 1952 the corporation found itself with a tremendous inventory, and of course the corresponding bills, which made it impossible to pay the bills. When we came up to, I believe it was about the first of November, 1952, the corporation had approximately \$85,000 indebtedness. I of course was called in on all of their meetings of the directors and I examined their various financial statements, and it was about this time, as I say, I think probably the first of November would be a closer period, when the balance sheet of the first of that month disclosed there was this indebtedness of

(Testimony of Arthur B. Baines.)

\$85,000 owing to approximately 158 creditors. But offsetting that was about \$135,000 or \$140,000 worth of inventory. I think that is generally about what the financial picture was.

Of course my opinion was asked for. I was very familiar with the organization and the stock, and an investigation disclosed that this was what is known as clean stock. In other words, the stock was all merchantable, but it did represent items, for instance, that could only be sold at Christmas-time, other items could only be sold the following year at, say, Valentine's Day and Mother's Day and the various holidays along the line, and of course a big school supply which wouldn't be able to be sold until the following fall. So I suggested to the Board of Directors in view of the fact that it was clean stock and in view of the fact that the basis of the organization, that is, the stockholders were still about forty or forty-five members, that the member stores if given an opportunity would be able to liquidate this stock, and instead of the stock being thrown on the market as salvage stock at that particular time, if we were able to sell the stock, the stockholders could probably get 100 per cent on the dollar. That was in my recommendation to the Board of Directors. Then in about the middle of January, starting January 15th, the corporation would pay 10 per cent a month to its creditors and any new purchases would be paid by cash. It would give us a full year cycle for the selling of stock. That was the recommendation I made about the end

(Testimony of Arthur B. Baines.)

of November, 1952. I was authorized by the Board of Directors to take whatever steps were necessary to see at that time if these steps could be put into force.

Q. At that time who was the largest creditor of the company?

A. The First National Bank of Portland. I believe it is the Industrial Branch.

Q. Did you contact The First National Bank with reference to such a plan as you have just outlined here now? A. I did.

Q. Tell us about when and where that was and who was with you and so forth.

A. After being authorized by the Board of Directors to proceed to see what could be done—of course, at that time, also, there were several large creditors. There was The First National Bank; there was a company I believe known as The East Tablet Corporation or some such name as that, to which I believe there was a \$13,000 indebtedness. There were certain other creditors who were threatening legal action at that time. Of course Mr. Ankrom was the general manager of the corporation, and it was my recommendation to Mr. Ankrom that we take the biggest creditors first. The biggest creditor was The First National Bank. It was previously told us that The First National Bank would not go on, but would force us into a petition in bankruptcy. At that time Mr. Ankrom suggested we go over and see Mr. Arthur Lynn, who at that time was and still is manager of the Industrial Branch

(Testimony of Arthur B. Baines.)

of The First National Bank. That was close to the first of December, 1952.

Mr. Ankrom and I went over. We discussed the matter with Mr. Lynn. We put our cards on the table just exactly as I have informed the Court here today, and asked Mr. Lynn his opinion of the plan and also whether or not The First National Bank would go along with us, being the first biggest creditor. We explained to Mr. Lynn obviously if he didn't go along with us we were stopped. We also asked Mr. Lynn for any suggestion he might have, we appreciated that his opinion might be worth something to us. We were there quite awhile and Mr. Lynn assured us the plan sounded feasible to him and The First National Bank would go along with us on the plan.

Q. Some importance may be attached here to exact words. Are you quoting Mr. Lynn's exact words in your opinion or are you drawing a conclusion from his words when you say that he said they would go along with the plan?

A. I would say, Mr. Boyrie, that that—of course, that was about two years ago, but that was substantially Mr. Lynn's wording, that he felt, too, as Mr. Ankrom and I did, that the plan was feasible and that the corporation could work out the financial difficulties, and that they would go along with us on the plan. That is substantially what was stated.

Q. Did you call personally on any other creditor, you personally?

(Testimony of Arthur B. Baines.)

A. No. You see, Mr. Boyrie, most of the creditors were outside of Portland. In other words, there were several in Seattle and several in San Francisco. Perhaps the largest majority were in New York or in the environs of New York. As I recall, the only two or three creditors that I talked to over the telephone were Johnson-Lieber, brokerage firm; there was a stationery house and the printing house. As I recall there were four local creditors.

But Mr. Lynn was the only one, The First National Bank, that I talked to personally, other than Mr. Ankrom, as I understand it, talked to many others personally.

Q. After this meeting which you have related with Mr. Lynn, what did you then do in furtherance of this plan of extension, let's call it, for the Northwest Variety Wholesale?

A. I then wrote a personal letter, an individual letter, to each of the creditors and outlined the plan to each of the creditors just as I have outlined it here today. Just set it out in chronological order what we hoped to do and what our recommendation was.

The Referee: Did you ask for consents or what did you do?

A. No, we didn't, your Honor. We put it on definitely a voluntary basis. In my correspondence I explained to each individual creditor that we were faced with a proposition of bankruptcy or attempting to liquidate this stock in orderly manner, that we were not asking for any written con-

(Testimony of Arthur B. Baines.)

sent, that we were just asking their tolerance and forbearance. That unless all the creditors strung along with us it meant bankruptcy, and in my opinion I felt it would be a tremendous loss to each of the creditors because I didn't feel that the stock under forced sale would bring very much money, so we just put it on a voluntary basis with all creditors.

Mr. Boyrie: I would like to have this marked for identification.

(Thereupon copy of letter addressed to Eastern Tablet Corporation, dated December 15, 1952, was marked Trustee's Exhibit No. 1 for identification.)

Q. This letter that is marked Trustee's Exhibit No. 1 was a copy of a letter addressed to the Eastern Tablet Corporation. That is the corporation you just mentioned a moment ago?

A. That is right.

Q. The second largest creditor?

A. The second largest creditor, I believe, yes.

Q. I believe the bank was twenty-two thousand?

A. That is correct.

Q. And I believe they were thirteen thousand?

A. I believe they were eleven thousand, thirteen thousand, or twelve thousand, somewhere in that vicinity.

Q. Is this a copy of the letter you wrote to the Eastern Tablet Corporation?

A. Yes, that is a copy of a letter to be sent December 15th.

(Testimony of Arthur B. Baines.)

Q. Is that the same form of letter which was to be sent to the other creditors of the corporation?

A. That is substantially the same letter that went to all the creditors. The only place where it varied, we did have letters, for instance, in some cases if I would be the attorney for various companies. In other cases it would be from certain creditors' agencies. In some cases by the time we started trying to reorganize, many of the creditors had just come out, "If we don't receive the money by such and such a date, we are going to start legal action." I had to vary the letter in that particular case, but outside of that variance, that is substantially the same type of letter that went out to all the creditors.

The Referee: You didn't use a circular letter?

A. No, no, your Honor.

The Referee: Did most of the creditors acquiesce, or did you have much trouble?

A. I would say after about the first month—I used to keep a day-to-day memo—at the end of the first month I had heard from, say, approximately 50 per cent of the creditors that they would go along with us. I would say perhaps 10 or 15 per cent were belligerent and antagonistic at that point, and after a month's time I would say there were 40 per cent of the creditors I hadn't heard from at all at that particular time.

Mr. Pendergrass: That was after a month, you said?

A. That is right, Mr. Pendergrass.

(Testimony of Arthur B. Baines.)

Mr. Boyrie: I offer this Trustee's Exhibit No. 1 in evidence.

The Court: It will be received.

(The copy of letter marked Trustee's Exhibit No. 1 for identification was offered and received in evidence.)

TRUSTEE'S EXHIBIT No. 1

Eastern Tablet Corporation December 15, 1952
P.O. Box 1110, Albany, New York

Gentlemen:

I have been requested to write to you, as a creditor of my client, Northwest Variety Wholesale, Inc., regarding their present condition and proposed solution to remedy same.

Last Spring, upon the advise of a national firm of business consultants, my client increased their inventory far beyond their past normal business requirements. The promised sales promotion was not subsequently realized and my client then found themselves in the embarrassing position of a much greater inventory than could be readily liquidated. This was so, because much of the inventory was in seasonal merchandise which could not be liquidated in an orderly manner in time, less than a full year's business cycle.

Their financial position is sound only so long as their inventory can be sold in a normal manner. If it had to be quickly liquidated, considerable of it, would have only salvage value. Northwest Variety

(Testimony of Arthur B. Baines.)

Wholesale, Inc., has the same set up which they had during 1951, with the same sales expectancy.

My client has been in business since 1946, showing considerable gain from the start and except for the ill proven advise of said experts, this too would have been a good year.

After considerable study and investigation, my client has, I believe, justifiably come to the conclusion that if all creditors will be patient and cooperative for a definite period of time, that all will be paid in full, as well as retain a customer, whom I trust, has proven valuable and satisfactory in the past.

The proposed plan is as follows: If my client would be permitted to pay your account in ten equal monthly installments, starting with January 15, 1953, then they would continue operation and purchase merchandise on a cash basis. By Oct. 15, 1953, all accounts would be paid in full and all excess inventory would be liquidated.

We have taken this matter up with several of our local creditors, who have agreed with this plan, whole heartedly, as being a feasible plan, and justifiable, considering their past growth and record.

I will appreciate any consideration that you can give this matter and will be glad to furnish any further details upon request.

Very truly yours,

/s/ Arthur B. Baines

ABB:lje

(Testimony of Arthur B. Baines.)

The Witness: When we made our first 10 per cent payment in January, 1953, there were some forty-five or fifty creditors I hadn't heard from at that time, but the straight 10 per cent payment was made to all the creditors.

Q. (By Mr. Boyrie): You were asked about a circular letter. You stated you sent the same general letter to all creditors. You kept your initial letter, then, and any further correspondence in folders in your office?

A. That is correct.

Q. And according to the letters of the alphabet you put in each folder the correspondence with each particular creditor, is that right?

A. That is correct.

Q. You might clarify that. Is the file of your records with respect to the correspondence with these different creditors?

A. That is correct.

Q. Some of the creditors, I understand, came right back and said, "O.K." Some of them were quite complimentary, were they not?

A. Very much so.

Q. Said they were happy to go along with the program. Some said, "To heck with it," they were going to sue and attach right away?

A. That is right.

Q. Did you have some more correspondence from the people like that?

A. I would say from a dollar standpoint by the end of the first month we had the biggest percent-

(Testimony of Arthur B. Baines.)

age of the creditors who had agreed to go along with us. A great deal of trouble came from some of the small creditors who thought that, theirs being only a small amount, they should be paid up completely. They didn't want to fool around with a 10 per cent cut.

Q. You sent 10 per cent in January, February, March, April, and May, so that you paid a total of 50 per cent under that plan, is that right?

A. That is close, yes, sir.

Q. What was the condition in June?

A. In June actually what the situation was, we had anticipated that the current business would continue at a faster rate than actually developed. We had anticipated when the corporation went back more or less to the old way of doing business about the first of December, that is, on a co-operative basis, and judging from the past experience of the co-operative, we had anticipated that same business would come back into the corporation again. But it didn't, so there wasn't enough current business to keep the organization going, and along about what would be the sixth payment in June there wasn't enough money to make the sixth payment.

At that time we called a meeting of the stockholders to inquire whether the stockholders thought they should continue, whether they wanted to keep the corporation going on a co-operative basis, but by that time they were discouraged and decided they would just write it off at that time, and I was authorized then to file a petition of bankruptcy.

(Testimony of Arthur B. Baines.)

Q. During the time that the five months' dividends of 10 per cent each were paid, such dividend was paid each month to The First National Bank, wasn't it? A. That is correct.

Q. And to each of the other creditors?

A. Yes, sir.

Q. Did anybody during those five months take any steps to close the corporation up, that is, did anybody file suit or attachment against the corporation?

A. I believe there were two legal actions that were filed, or one was threatened and one was filed. I believe there are actually two but that was all and everybody else for about three months had accepted and were assuming that the plan would be completed. I would say after about the middle of April was the last trouble we had had.

The Referee: What did you do with those who didn't go along?

A. We gave a 10 per cent payment on the fifteenth of each month. Even if a creditor said he wouldn't accept it, we still sent him a 10 per cent payment. We wrote them a letter and told them, such as a certain creditor even though he didn't accept it, in view of the fact that we had stated we would pay out a 10 per cent payment, if he didn't want to cash the check, we were leaving it to his own discretion but we were still paying a 10 per cent dividend at that time.

Q. (By Mr. Boyrie): Then nobody questioned the 10 per cent?

(Testimony of Arthur B. Baines.)

A. After about the middle of April I don't think so, Mr. Boyrie. By the middle of April the creditors accepted it. Of course, I told them if they filed an action it would take about a year to get a judgment on it, and by that time it would all be paid out anyway.

The Referee: What did you do with the one that was filed? Did you file an answer?

A. We filed an answer with the firm of Goldstein, Galton & Galton. I contacted Mr. Galton and explained what the situation was. After the explanation his client went along with us. I believe it was the Sessions Clock account. Also Mr. Bonyhadi of Messrs. Rosenberg, Swire & Coan, was ready to file for his client, and I explained the situation to him and he recommended to his client to go along with the rest.

Q. (By Mr. Boyrie): You told us about the first conversation with Mr. Lynn. Were there any subsequent conversations with Mr. Lynn or any representatives of The First National Bank in which you participated?

A. I recall seeing Mr. Lynn on another occasion. It is possible it could have been two other occasions. I felt that Mr. Lynn was entitled to at least the courtesy of being kept advised as to the plan that was being made. I recall one time calling Mr. Lynn on the telephone and one other time—it is possible it could have been two other times that I talked with him personally when I was either going to the office at Northwest Variety or going back. I just

(Testimony of Arthur B. Baines.)

went in as a courtesy call and advised Mr. Lynn that the plan was working out on schedule as we anticipated, more or less to vindicate Mr. Lynn's feeling about the organization, as our own.

Q. You addressed no letter to the bank, did you?

A. No, I didn't because that was the first creditor we talked to and that was the first creditor to agree to it.

Q. You received no written commitments from the bank? A. No, sir.

Q. Nor did you ask for any formal statement from other creditors, did you? A. No.

Q. You did receive some commitments from them in answer to your letter?

A. That is correct.

Q. In the case of creditors who weren't satisfied with the showing made by your first letter or with the statement of your first letter, did you refer any of such creditors to The First National Bank?

A. Yes, I would say several—probably many would be more accurate—of the creditors who wrote out to us and asked us for further information, I believe I stated in some of my letters that we had discussed the matter with some of the large local creditors. I believe I used the term "creditor" or "creditors"—I used that little loosely—who had agreed to the plan. I received then letters from some of the creditors who wanted to know who some of these large creditors were whom we had discussed the plan with, who had accepted. So of course in each of those cases I referred them first

(Testimony of Arthur B. Baines.)

to The First National Bank and then I referred them to Johnson-Lieber and this local printing house, who was one of the local creditors too.

Q. You might refresh your memory from your file here, if you will. Did you refer the Eastern Tablet Corporation to The First National Bank?

A. That is correct, Mr. Boyrie.

Q. What did you tell them about The First National Bank?

A. I said the company was then sound with an inventory of over eighty thousand and with 158 creditors. "Our local banker who watched our condition on a weekly basis, after going over the proposed plan as written to you, felt that it was a feasible one and that my client would have no trouble in carrying through with it, and was one of the first to agree to go along with same." That is the end of the letter.

Q. How about the National Mask & Puppet Corporation? Did you refer them to The First National Bank?

Mr. Pendergrass: May I ask a question?

The Referee: Yes.

Mr. Pendergrass: I assume all of this has gone in to show that the bank agreed to the extension of the ten-month agreement as such. Is that *is* what you are aiming at?

Mr. Boyrie: It is rather doubtful that it shows that, Mr. Pendergrass. I will follow it up. I just want to show that Mr. Baines did refer creditors to The First National Bank, each one of these

(Testimony of Arthur B. Baines.)

creditors on which I have examined him to The First National Bank. If The First National Bank would argue Mr. Baines statement isn't correct, it probably is of little or no value, but I think at the present time it has some value.

The Witness: On February 18, 1953 in answer to Mr. Aaron C. Samuels of the National Mask & Puppet Corporation, I wrote him as follows: "Our largest creditor, The First National Bank, who have an unsecured loan in the sum of \$20,000, were the first to endorse this proposed plan, and I am sure that if you would care to write to Mr. Arthur Lynn, Manager of the Industrial Branch of said bank, that he would corroborate what I have stated herein."

Q. (By Mr. Boyrie): Do you offhand recall, to shorten this up, any other creditors whom you referred to The First National Bank?

A. I have no independent recollection of any others but I know there were several others whom I did refer to The First National Bank.

Q. How about Wooster Rubber Company? Here is a letter to Wooster Rubber Company.

A. Yes, on January 7, 1953 I wrote a letter to Mr. G. C. Neal, the General Manager of the Wooster Rubber Company. I state, "It is true that you are one of the larger creditors, there being several, however, larger, one being The First National Bank of Portland, Oregon, who, after a thorough investigation, were the first to agree with this plan."

Mr. Pendergrass: I am quite willing to concede

(Testimony of Arthur B. Baines.)

that Mr. Baines was of the opinion that the bank agreed. It makes no difference to me. You can keep on with it.

Mr. Boyrie: I will go on to something else.

Q. (By Mr. Boyrie): Do you know if any of those creditors ever made inquiry at The First National Bank? A. That I do not know.

Mr. Boyrie: I think that is all.

Cross Examination

Q. (By Mr. Pendergrass): Going back, Mr. Baines, to your conversation with Mr. Lynn in December where you and Mr. Ankrom and Mr. Lynn were present, you said that you understood from the substance of the conversation that Mr. Lynn felt that the plan was feasible and that the bank would go along with the plan. Was that the understanding you acquired from the conversation, or can you particularize as to the words that were used?

A. I felt, Mr. Pendergrass, that I was giving the substance of the exact conversation as I remember it at this time.

Q. You are not attempting to quote the conversation as such?

A. I was attempting to quote the conversation as close as I could recall it at this time.

Q. Do you mean to say, then, that those were the words that were used, or that that was your best recollection of what was said?

(Testimony of Arthur B. Baines.)

A. In my opinion those were substantially the words that were used by Mr. Lynn.

Q. Did you make any memoranda of the conversation at that time? A. Not a bit.

Q. When was the first time that the necessity of recalling that conversation was called to your mind? A. Just today.

Q. So you have not thought about the situation regarding that since December of 1952?

A. No, that isn't exactly true. As a matter of fact, Mr. Pendergrass, when this first started in December, this was almost a constant situation. This was a fighting situation to get 158 creditors to accept the plan. Of course Mr. Lynn's opinion, what he felt about it and what he told us, was of the deepest interest. As a matter of fact, many of the things I have told you, today is the first time I have looked at those things that I wrote about at that time, but this 158 letters and 158 creditors, the entire situation, it is just one of the things. There was so much. I can almost recall Mr. Lynn sitting at his desk. I was sitting on this side (indicating) and Mr. Ankrom on the other side, and we went over this financial statement. It was a very important thing.

Q. You have not had specific occasion to refer to that in your own thinking until today as an event?

A. Mr. Boyrie, I think, called me up here several months ago and he may have asked me about that conversation. I don't think anybody else asked

(Testimony of Arthur B. Baines.)

me to particularly quote the words of what it was at this particular time.

Q. (By The Referee): You wrote these letters and said he had agreed to the plan?

A. That is right; that is correct.

Q. You weren't lying to them, were you?

A. I certainly was not. That is what I say, that is substantially the conversation I had with Mr. Ankrom and Mr. Lynn and myself.

Q. The bank did go along with the plan?

A. Yes.

Q. The note was due? A. Yes.

Q. Did they sue you? A. No, sir.

Q. Did they accept their money?

A. They accepted their money every month.

(Witness excused.)

The Referee: Anybody else?

Mr. Boyrie: Mr. Ankrom.

DAVID E. ANKROM

was thereupon produced as a witness in behalf of the Bankrupt, and, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boyrie): Mr. Ankrom, you were the secretary-treasurer and manager of the bankrupt corporation, the Northwest Variety Wholesale, Inc., were you not?

A. That is right.

(Testimony of David E. Ankrom.)

Q. And had you so been ever since it was started? A. Right.

Q. We won't repeat regarding the history of the corporation. Let's come down to this period of the first time that you met with Mr. Lynn as representative of the First National Bank. Do you recall that occasion? A. Yes, substantially.

Q. You went to the bank with Mr. Baines?

A. Right.

Q. For the purpose of talking to Mr. Lynn regarding the troubles of the corporation?

A. That is right.

Q. And the feasibility of this plan?

A. Yes, sir.

Q. Now, tell us your recollection as to what happened at that time.

A. As I can recall the plan was presented to Mr. Lynn. It was presented on the basis of payment once every month for a twelve-month period. The suggestion was made that it wasn't thought that the creditors would go along with payments strung over that long a period of time and that they should be reduced to a ten-month basis.

Q. Let me get that straight. Who suggested they should be reduced? A. Mr. Lynn.

Q. Mr. Lynn? A. Yes.

Q. When you originally proposed the plan it was on a twelve-month basis?

A. That is right.

Q. Then what happened?

(Testimony of David E. Ankrom.)

A. I can't recall the words of the conversation but in effect Mr. Lynn agreed not to interfere.

Q. Not to interfere with what, Mr. Ankrom?

A. In other words, not to foreclose or press us for payment if we were continuing to pay as we went along.

Q. That is if you were continuing to make these 10 per cent monthly payments, you mean?

A. Substantially that is what we had agreed to do.

Q. Perhaps we jumped into that a little too quickly. Before you came to that point had you discussed the financial affairs? Did you have a balance sheet with you?

A. I don't recall whether we had one with us at that particular time or not.

Q. But at other times you had been over your balance sheet with him? A. Yes.

Q. Did you after this first time have any further conversations with Mr. Ankrom about the working of this plan?

A. You mean with Mr. Lynn?

Q. With Mr. Lynn.

A. Yes, I think from time to time. Of course I was in the bank periodically. I can't recall that a special trip was made for that purpose but there was often a word of greeting with Mr. Lynn, who has been very friendly. We belong to the same Kiwanis group, did at that time. There often was a casual "How is it going?" and a reply.

Mr. Boyrie: I think that is all.

Mr. Pendergrass: I have no questions.

(Witness excused.)

Mr. Pendergrass: Mr. Lynn.

ARTHUR W. LYNN

was thereupon produced as a witness in behalf of the Claimant herein, and, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Pendergrass): Will you identify yourself? A. Arthur W. Lynn.

Q. What is your position with the bank?

A. I am vice-president and manager of the Industrial Branch.

Q. Did the Northwest Variety Wholesale have an account at the bank, the Industrial Branch?

A. Yes.

Q. When was that account established?

A. It was originally established in 1946, July, I believe, under the name of—let's see, it was established at one of the other branches, incidentally, under the name of Northwest Buyers, I believe it was originally. It was subsequently changed.

Q. When was it changed, do you recall?

A. It was changed to Northwest Variety Wholesale. I believe our advise is dated July 16, 1951.

Q. I will hand you a photostatic copy of a letter and ask if you will refresh your recollection.

A. July 16, 1951.

Mr. Pendergrass: This is just to establish the

(Testimony of Arthur W. Lynn.)

opening of the account and the name it appeared under.

(Thereupon photostatic copy of signature card of Northwest Variety Wholesale, Inc., was marked Claimant's Exhibit No. 2 for identification, offered and received in evidence.

Photostatic copy of letter dated June 16, 1951, addressed to First National Bank of Portland, was marked Claimant's Exhibit No. 3, offered and received in evidence.

Photostatic copy of signature card of Northwest Buyers & Distributors and photostatic copy of minutes of Directors meeting of Northwest Buyers, Inc., was marked Claimant's Exhibit No. 4, offered and received in evidence.)

Q. What was the nature of the account that was established?

A. It was a commercial checking account.

Q. Was it at any time changed from a general commercial checking account? A. No.

Q. I asked you to prepare for me a summary of the activity of the account, the period beginning January, 1951 until the date the account was closed, showing the high balance and the low balance for each month and the number of checks which were presented each month. Is this the summary which you prepared? A. That is correct.

Q. I asked you also to obtain the bank duplicate copies of the statements of the account for the months of December, 1952 until the account was ultimately closed.

(Testimony of Arthur W. Lynn.)

Mr. Pendergrass: If the Court please, I have the originals and I have some copies. I would prefer to submit the copies and put the copies in evidence.

The Referee: They are true copies?

Mr. Pendergrass: They are true copies.

The Referee: All right, admit it.

Q. (By Mr. Pendergrass): Are these copies of those original statements?

A. Yes, those are copies.

The Referee: They will be received.

(Thereupon summary of bank account of Northwest Variety Wholesale, Inc., was marked Claimant's Exhibit No. 5, offered and received in evidence. Copies of bank statements of Northwest Variety Wholesale, Inc., were marked Claimant's Exhibit No. 6, offered and received in evidence.)

CLAIMANT'S EXHIBIT No. 5

Month	High Balance	Low Balance	No. of Checks
January 1951	21,572.10	16,662.98	89
February	18,396.38	3,658.50	251
March	16,157.70	524.59	268
April	17,972.29	8,199.87	280
May	25,763.65	5,824.45	344
June	14,550.24	379.13	234
July	19,191.99	4,124.72	320
August	20,490.80	885.96	268

Month	High Balance	Low Balance	No. of Checks
September 1951	31,203.09	10,626.92	178
October	23,023.69	7,758.55	358
November	9,468.58	412.61	258
December	20,036.43	2,728.94	240
January 1952	6,792.69	2,865.43	173
February	22,963.41	3,348.67	184
March	23,470.55	1,522.10	301
April	32,281.99	46.81	271
May	19,589.32	1,471.72	302
June	3,600.79	75.76	124
July	26,079.00	1,437.18	216
August	18,205.86	6,692.63	258
September	15,754.58	3,007.32	171
October	14,853.38	2,505.35	214
November	13,285.75	7,621.16	143
December	22,328.59	7,420.28	135
January 1953	25,897.57	16,689.42	172
February	21,842.82	8,382.70	119
March	10,120.79	481.05 OD	271
April	9,417.67	1,214.38	205
May	9,400.16	856.44	147
June	3,250.44	955.01	84
July	3,489.14	25.93	7

Q. (By Mr. Pendergrass): Were the funds in that account at all times subject to the limit of the checking of the depositor? A. They were.

Q. Was there at any time any restriction placed on the right of the depositor to withdraw any funds? A. No.

(Testimony of Arthur W. Lynn.)

Q. Do you recall the occasion of the discussion which Mr. Baines and Mr. Ankrom both refer to?

A. Yes, I do.

Q. What was the substance of the conversation as you recall it?

A. As they have related, Mr. Baines and Mr. Ankrom came in and presented the condition they found themselves in and asked us to go along. It is true they did first suggest a twelve-month payment program and I believe they wanted to make quarterly payments. I told them I would not accept quarterly payments, that we wanted to take a look each month and we would go along on a month-to-month basis. We expected a report of their program each month.

Q. Did you agree to a ten-month extension?

A. I didn't agree to a ten-month extension. I agreed to go along on a month-to-month basis and if I considered conditions were acceptable each month, to accept a 10 per cent monthly reduction.

Q. Were payments made in accordance with this understanding? A. Yes.

Q. How many payments?

A. There were five payments made.

Q. What was the amount of each payment?

A. Twenty-two hundred dollars.

Q. Was this sum applied to the indebtedness?

A. Yes, that was \$2,200 principal plus the interest each month.

Q. At the time the petition in bankruptcy was filed, what was the amount owing?

(Testimony of Arthur W. Lynn.)

A. Eleven thousand dollars.

Q. I hand you a copy of the claim of The First National Bank, which is in the pleadings, and ask if you can tell what the accrued interest at that time was.

A. The accrued interest was \$73.33.

Q. When were you first advised that Northwest Variety Wholesale was considering bankruptcy?

A. It was the very last of June, as I recall it, when Mr. Ankrom told me they were considering it. He told me their directors were meeting to consider what steps to take.

Q. Did you prepare a memorandum at the request of Mr. Zollinger of your then recollection of this conversation and what followed it?

A. Yes.

Q. I'll hand you your file, which contains in it a memorandum. Is that your signature?

A. That is right.

Q. Would you look at that and tell me what the date is there, which indicates the date that you first recalled hearing about impending bankruptcy?

A. I shall read the paragraph in that letter: "On about June 20th a former employee who had been released previously in the process of curtailing expenses, told Ward Parker, who is an officer in our branch, while making a nominal payment, that the company was considering bankruptcy. We were unable to contact Ankrom for verification or denial of this that week, but about the end of June Ankrom indicated that their directors had decided

(Testimony of Arthur W. Lynn.)

that lack of volume would not justify their continuing to operate. Last Thursday, July 3rd, Ankrum was in the branch and told Mr. Parker that they were closing up and his salary was being terminated. Mr. Parker does not recall that he actually mentioned bankruptcy in the conversation."

Q. Will you read the next paragraph?

A. "On July 7th Arthur Baines, the attorney, came in and informed us he was preparing a petition in bankruptcy which would be filed when they had completed an inventory."

Q. What was the nature of the obligation which was owing the bank?

A. A promissory note.

Q. When was it due?

A. It was due—I will have to refresh my memory. I believe November of 1951. It was due November 10, 1951.

Q. Was any extension granted on the due day of that obligation?

A. No, there was no extension granted.

Mr. Boyrie: You don't mean 1951, do you?

A. 1952, pardon me. Yes, that is right, 1952.

Q. (By Mr. Pendergrass): Were you advised of any attachments or executions on any merchandise being made against the bankrupt?

A. No.

Q. Then did any creditor make any inquiry of you as to your reaction to this proposal?

A. I recall one indirect inquiry by telephone from a Portland bank on behalf of a correspondent

(Testimony of Arthur W. Lynn.)

bank in some other part of the country, I don't know where, in which they inquired what we knew of the condition of Northwest Variety Wholesale. I replied we had a past due obligation on which we were collecting monthly and we hoped it would work out.

Q. Did you state at that time that you had agreed to any ten-month extension or any other extension? A. No.

Mr. Pendergrass: That is all.

Cross Examination

Q. (By Mr. Boyrie): Is it correct, like Mr. Ankrom stated, that he talked about the affairs of the corporation with you from time to time?

A. Mr. Ankrom brought their check in each month and told me of their program.

Q. This is after the liquidation?

A. Yes.

Q. At the time they were seeking to put this plan of payment into effect, did he discuss with you their financial condition?

A. Of course he and Mr. Baines discussed the financial condition at that time.

Q. That is that first time they came in?

A. Yes.

Mr. Pendergrass: That is the conversation of December?

Mr. Boyrie: Yes, in December 1952.

A. Yes.

(Testimony of Arthur W. Lynn.)

Q. You say they first had a plan they were going to make a 25 per cent payment quarterly?

A. Yes, I think that was their first proposal.

Q. You said the bank wouldn't go along with that?

A. Yes.

Q. It would go along with 10 per cent monthly?

A. On a month-to-month basis.

Q. Your note was due at this time?

A. That is right.

Q. You didn't demand payment of it at that time?

A. No, we did not.

Q. I think you show here your reason for producing these figures is to show there was enough money in their bank account to pay their note in full if you wanted to apply it.

A. There was from time to time. I cannot remember whether there was at the time of that particular discussion.

Q. But in any event, you hadn't any intention and you didn't apply it to the payment of your note?

A. No.

Q. Then you went ahead and received your January 10 per cent, didn't you?

A. Yes.

Q. And you were satisfied with conditions on January 10th?

A. I was hopeful, let us say.

Q. And you waited for your February payment. You certainly wouldn't have felt that you could have brought any legal action against them in February. It never occurred to you to bring any legal action against them in February, say, of 1953?

(Testimony of Arthur W. Lynn.)

A. It could have occurred to me to have offset the account at that time because the balances remained substantial at times during the month, and some months after that.

Q. You mean you could have done it in February and sometime afterward? A. Yes.

Q. What I am asking is would you have felt that you were legally and morally entitled to file a suit against them in February?

A. If we saw fit, there was no reason why we shouldn't do it.

Q. No reason why you shouldn't do it. You wouldn't say, Mr. Lynn, that you said something like this to them: "Now, Mr. Baines and Mr. Ankrom, you cut this down to a monthly payment basis, 10 per cent a month, we will go along with you and take our 10 per cent a month, but, mind you, we can soon attach you anytime we want to"? Did you tell them something like that?

A. I did not use those words. I don't very often threaten people, but I did impress upon them, I am sure, in my opinion this was strictly on a month-to-month basis, that we could call it quits anytime we wanted to.

Q. Did they discuss with you when the plan was put into effect how they intended to liquidate the stock.

A. That they intended to liquidate it. They set forth the fact that it was seasonal inventory there that would have to be liquidated through the seasons. However, after I questioned them about their

(Testimony of Arthur W. Lynn.)

seasonal items, it appeared to me if they got their price out of the inventory it shouldn't take as long as they anticipated to move it, for as long as they were asking, shall we say.

Q. That is at the time you recommended they cut it down to the ten months?

A. That is the time I insisted they pay at least 10 per cent each month.

Q. In subsequent conversations did they tell you they had all the creditors in and were paying out the 10 per cent a month to all of them?

A. Yes.

Q. Then you got their payment regularly. You brought that out before, January, February, March, April and May.

A. That is right.

Q. Then you learned they were closing up in June?

A. Yes.

Q. When did they make this explanation of this setoff?

A. I believe that was July 14th. It is not on this sheet.

Q. You say you have no recollection of any correspondence from any creditor?

A. I can't remember any correspondence at all.

The Referee: Did you look at your correspondence file to see whether you wrote any letters on this?

A. Yes, I have looked through the file. I am sure I would remember any letters I have written.

The Referee: I would like to have you look through your file and let me know.

(Testimony of Arthur W. Lynn.)

A. Yes.

Q. (By Mr. Boyrie): You say you remember one telephone conversation?

A. One telephone call.

Q. Some bank was calling about some correspondent? A. Right.

Q. You explained the plan to them and told them it worked out? A. Yes.

Q. Did you tell them there was a general plan in effect? A. No, I did not.

Q. You are sure of that?

A. I can't remember telling them about it because I had no first-hand knowledge of how concrete that plan was actually.

Q. (By the Referee): Didn't you obtain monthly statements from them? A. No.

Q. When a company is in a condition like that, didn't you ask for monthly statements?

A. The company did not have enough personnel to prepare statements to be of any value.

Q. You had considerable confidence in Mr. Ankrom from a business angle?

A. Yes, I have.

Q. You were willing to accept his payments without asking for any formal report on how the liquidation was going?

A. That is right, I required no written report because with the restricted personnel they had down there in an effort to keep their overhead to a minimum, it was impossible for them to prepare inventories monthly.

(Testimony of Arthur W. Lynn.)

Q. And through May they said it was working out all right? A. Yes.

The Referee: Any other questions?

Mr. Boyrie: That is all.

Redirect Examination

Q. (By Mr. Pendergrass): Would you look at the sheet and tell me what the balances were on December 16th and December 31st?

The Referee: I can look up those. I would like to finish this as quickly as possible. We won't try to have the arguments this afternoon.

Q. (By Mr. Pendergrass): Did you ever at any time agree to defer legal action against Northwest Wholesale?

A. I cannot say I agreed to defer legal action, no. I implicitly agreed probably to defer any action from month to month.

Mr. Pendergrass: That is all.

The Referee: Any other?

Mr. Boyrie: No.

(Thereupon at 3:30 p.m., September 13, 1954, the hearing in the above entitled matter was concluded.)

[Endorsed]: Filed February 25, 1955.

[Endorsed]: No. 14837. United States Court of Appeals for the Ninth Circuit. The First National Bank of Portland, a National Banking Association, Appellant, vs. Frank A. Dudley, Trustee in Bankruptcy of the Estate of Northwest Variety Wholesale, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: July 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14837

In the Matter of NORTHWEST VARIETY
WHOLESALE, INC., Bankrupt.

STATEMENT OF POINTS ON APPEAL

The First National Bank of Portland, Appellant herein, files its Statement of Points on which it intends to rely on appeal herein as follows:

1. The United States District Judge for the District of Oregon erred as a matter of law in affirming the Order of the Referee Disallowing the Claim of The First National Bank of Portland unless the

sum set off by the Bank be surrendered to the Trustee, for the reasons that:

(a) The Referee's Conclusion of Law that the Bank waived its right to assert a set-off of the balance of the Bankrupt's account against the Bankrupt's indebtedness owing the Bank is not supported by the facts and is contrary to law.

(b) The Referee's Conclusion of Law that the Bank so conducted itself as to be estopped to assert its right to set off the balance in the Bankrupt's account against the indebtedness owing the Bank is not supported by the facts and is contrary to law.

(c) The Referee's Conclusion of Law that the bank account maintained by the Bankrupt with the Bank had, at the time of the exercise of the right of set-off, acquired the character of a trust fund and was therefore not available by the Bank to be set off against the Bankrupt's indebtedness owing it is not supported by the facts and is contrary to law.

(d) The Referee's Conclusion of Law that the claim of the Bank should be disallowed unless the sum of \$2889.14 which is the sum set off by the Bank against the Bankrupt's indebtedness owing it, is surrendered to the Trustee is not supported by the facts and is contrary to law.

2. The Findings of Fact made by the Referee and the transcript of testimony and exhibits establish that The First National Bank of Portland was authorized by the applicable statutes and the cases

construing the same to set off the balance in the general commercial account maintained by the Bankrupt with the Bank against the indebtedness owing by the Bankrupt to the Bank.

Dated this 25th day of July, 1955.

Respectfully submitted,

/s/ V. V. PENDERGRASS,

/s/ R. R. BULLIVANT,

/s/ WALTER H. PENDERGRASS,

Attorneys for Appellant The First
National Bank of Portland

Acknowledgment of Service attached.

[Endorsed]: Filed July 26, 1955. Paul P. O'Brien,
Clerk.

United States
COURT OF APPEALS
for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORTLAND,
a National Banking Association,

Appellant,

vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of the
Estate of Northwest Variety Wholesale, Inc.,

Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

PENDERGRASS, SPACKMAN & BULLIVANT,
V. V. PENDERGRASS,
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OCT 12 1955

PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORTLAND,
a National Banking Association,

Appellant,

vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of the
Estate of Northwest Variety Wholesale, Inc.,

Appellee.

BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

STATEMENT OF PLEADINGS AND JURISDICTION

Appellant is a national banking association engaged in the general banking business in the State of Oregon and, for the purpose of convenience, will be hereafter referred to as the Bank. Northwest Variety Wholesale, Inc., an Oregon corporation, is in bankruptcy, and will be hereafter referred to as the Bankrupt. Respondent is the Trustee in Bankruptcy of this bankrupt estate and, also for the purpose of convenience, will be hereafter

referred to as the Trustee. At the time of its adjudication as a bankrupt, which was July 13, 1953, the Bankrupt maintained a general commercial account with the Bank and was indebted to the Bank upon a matured obligation. After the petition in voluntary bankruptcy was filed the Bank exercised its right of set-off and later filed with the Trustee its claim for the balance owing to it.

The Trustee filed his objection to the claim, alleging that the right of set-off was improperly exercised, and praying that the Bank be required to pay the sum set off to the Trustee as a prerequisite to the allowance of its claim. The Bank filed its answer to these objections asserting the validity of its set-off, alleging that it was properly exercised and praying that its claim as previously filed be approved.

The matter came on for hearing before the Honorable Estes Snedecor, Referee in Bankruptcy. Testimony was introduced and arguments made with the result that on February 15, 1955, the Referee made and entered his Findings of Fact and Conclusions of Law and, based thereon, his Order Denying the Claim.

A Petition for Review by the District Judge of the Order of the Referee, pursuant to the provisions of United States Code, Title 11, Section 67, was timely filed. The issues raised in the Petition for Review were considered by the District Court and an Order Affirming the Order of the Referee was entered on June 6, 1955. Timely appeal from the Order of the District Court was made on June 23, 1955, pursuant to the provisions of United States Code, Title 11, Sections 47 and 48.

STATEMENT OF THE CASE

In July of 1946, the Bankrupt, then doing business under the name of Northwest Buyers, opened a general commercial account with the Bank. This is the same account, unchanged in any respect, that was in existence at the time of the bankruptcy, and the balance in this account at that time is what was offset by the Bank. At no time was there any special arrangement of any kind concerning the account or the manner in which or the purposes for which it was to be maintained, nor was there any special understanding concerning the funds to be deposited therein or withdrawn therefrom. The account was always subject to the unrestricted check of the Bankrupt.

On October 11, 1952, the Bank loaned the Bankrupt the sum of \$22,000.00 evidenced by an unsecured promissory note payable thirty days after date. On the date the note became due and until the date of the conference to which reference is hereafter made there were sums on deposit in the Bankrupt's account ranging from approximately \$7,000.00 to approximately \$11,000.00, but never less than \$7,000.00. The Bankrupt made deposits in and drew checks on the account in the same manner and with approximately the same activity after the date of the conference to which reference is hereafter made as it had been from its opening until that date.

Some time during December of 1952, but prior to December 15th, Mr. David E. Ankrom, Secretary-Treasurer of the Bankrupt, and Mr. Arthur B. Baines, attor-

ney for the Bankrupt, called at the branch office of the Bank wherein the Bankrupt's account was maintained and informed Mr. Arthur W. Lynn, Vice President and Manager of this Branch, that the company was in financial difficulty. During this conference the representatives of the Bankrupt stated that it would like to arrange for the payment of its existing indebtedness in quarterly installments over a 12-month period. Mr. Lynn replied that this arrangement would not be acceptable to the Bank but that, if the indebtedness were paid in ten equal monthly installments commencing on January 15, 1953, the Bank would defer any action to recover the balance owing on the defaulted obligation so long as the installments were promptly paid, but not otherwise. Pursuant to this understanding, installments were paid in the months of January, February, March, April and May of 1953. No payment was made in either June or July.

On July 13, 1953, the Bankrupt filed its Petition in Bankruptcy. On July 14, 1953, after the Bankrupt had defaulted in the payment of the June installment and after it had filed its petition in bankruptcy, the Bank charged the account of the Bankrupt with the sum of \$2889.14, which was the balance then credited thereto, and credited the same upon the note of the Bankrupt owing to the Bank, leaving a balance of \$8184.19 which is the amount of the Bank's claim filed in this bankruptcy proceeding.

The primary question on this appeal involves the right of the Bank to exercise its right of set-off in this

manner. This, in turn, presents the supplementary questions of whether or not, under the circumstances involved in this case, this right has been waived or the Bank is for any reason estopped from asserting it.

SPECIFICATION OF ERROR

This is an appeal from the Order of the District Court affirming the Order of the Referee in Bankruptcy denying the claim of the Bank. The District Court did not state any Finding of Fact or Conclusion of Law either in his opinion or in the Order affirming the Order of the Referee. In his Opinion the Court indicated that it would not be inappropriate for the Bank to take an appeal to this Court, and it is assumed, therefore, that the conclusions of the District Court were similar to those of the Referee. Consequently, for the purpose of presenting the issues raised in this matter to this Court, the more detailed Findings of Fact and Conclusions of Law of the Referee will be considered as having been Findings and Conclusions of the District Court. Assuming, therefore, that the Findings and Conclusions of the District Court were the same as those of the Referee, the Bank, as the Appellant, asserts that the Court erred in the following particulars:

1. The Court erred in concluding as a matter of law, based upon the Findings of Fact, that the Bank waived its right of set-off.

2. The Court erred in concluding as a matter of law, based upon the Findings of Fact, that the Bank

so conducted itself as to be estopped to assert its right of set-off.

3. The Court erred in concluding as a matter of law, based upon the Findings of Fact, that at the time of the exercise of the right of set-off, the bank account maintained by the Bankrupt with the Bank had so acquired the characteristics of a trust fund that it could not be used in set-off.

4. The Court erred in concluding as a matter of law, based upon the Findings of Fact, that the claim of the Bank should be disallowed unless the sum of \$2889.14, which was the amount set off by the Bank, should be surrendered to the Trustee.

5. The Court erred in not concluding, as a matter of law and based upon the Findings of Fact made by it, that the Bank was in all respects authorized to exercise its right of set-off in the manner in which it did and that the claim of the Bank should accordingly have been allowed.

ARGUMENT

Proposition I.

A creditor has the right to set off a debt owing by it to the bankrupt against a debt owing by the bankrupt to it; and, if the parties do not effect the set-off prior to bankruptcy, it is the duty of the trustee to do so after the bankruptcy.

11 U.S.C.A., Sec. 108;

Studley v. Boylston National Bank, 1913, 229 U.S. 523; 57 L. Ed. 1313;

Continental & Commercial Trust & Savings
Bank v. Chicago Title & Trust Company,
1912, 229 U.S. 435; 57 L. Ed. 1268;
In re Field Heating and Ventilating Co., Inc.,
7th Circuit, 1953, 201 F. 2d 316.

The applicable statute is 11 U.S.C.A., Sect. 108. It contains the following provision:

“a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.”

Subsection (b) of this statute provides two circumstances where the set-off will not be allowed. The first is of a claim that is not provable against the bankrupt's estate, and the second is where the claim is purchased by or transferred to the creditor with a view to his obtaining a preference. It is not contended that the set-off exercised by the Bank in this case should be denied for either of these reasons.

The case of *Studley vs. Boylston National Bank of Boston*, 1913, 229 U.S. 523, 57 L. Ed. 1313, is noteworthy particularly for the discussion by the Supreme Court of the United States of the principle of set-off and for the expression of the attitude of the Supreme Court that it is a right existing at common law, expressly preserved by statute, and not lightly to be circumscribed or restricted.

The case involved the Collver Tours Co., hereafter called the “Company”, which was in the business of conducting world tours. In 1907 it opened a general

commercial account with the Boylston National Bank of Boston, hereafter called the "Bank", with which it subsequently did all its banking business. In 1909 it established a line of credit of \$25,000.00. In early 1910 the Bank was advised that the Company was in some financial difficulty. The Company's officers made suitable explanation, and the Bank made an additional loan of \$5000.00 to it, increasing the total outstanding obligations of the bankrupt to the Bank to \$30,000.00. This was shortly thereafter reduced to \$25,000.00, represented by five \$5000.00 notes, maturing respectively on September 12, 20, 30 and October 3 and 14 of 1910. The three notes due in September were paid as they became due by check drawn by the Company on the Bank. On October 3 the Bank offset sufficient of the Company's commercial account to pay the note then due, and it did the same thing on October 14 with the note due on that date. At the date of the last set-off there was approximately \$19,000.00 left in the account.

On December 16, 1910, the Company filed a petition in bankruptcy. The trustee claimed that \$22,500 of the payments made in the four months preceding the filing of the petition operated to give the Bank a preference. It was found that the deposits were honestly made in the regular course of business and without any intention of creating a preference. The set-off was allowed.

After reciting the facts of the case and quoting that portion of the Bankruptcy Act which is hereinabove set forth, the court continued with the following discussion of the right of set-off (229 U.S. at page 528, 57 L. Ed. at page 1316):

“That section did not create the right of set-off, but recognized its existence, and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off—is a right given or recognized by the commercial law of each of the states, and is protected by the bankruptcy act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

“The banker’s lien on deposits, the right of retention and set-off of mutual debts, are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries, and suit is brought by one against the other, the defendant, to avoid a circuity of action, may interpose his mutual claim by way of defense, and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaim can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in 68a which prevents the parties from voluntarily doing, before the petition is filed, what

the law itself requires to be done after proceedings in bankruptcy are instituted.

"The bank was indebted to the Collver Company as a depositor some \$54,000 for money deposited in good faith in the usual course of business, and with no purpose of enabling the bank to secure the right of set-off. The Collver Company, on the other hand, was indebted to the bank \$25,000 on notes maturing at various dates. These were mutual debts, and if, on the date the first note became due, the Collver Company had failed to pay it, the bank could have enforced its banker's lien or its right of set-off, by applying \$5,000 of the deposits in payment of the note which matured that day, and so on as each of the other notes became due. It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14, to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for \$5,000 were paid or note for \$5,000 was charged was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off.

"The bankruptcy act recognizes this right, and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off in cases like this would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy, and so interfere with the course of business as to produce evils of serious and far-reaching consequence.

"Affirmed."

This case established the policy to be followed by the courts in dealing with the right of set-off. It emphasized that the statute did not create a right in derogation of

the common law, and therefore under the acknowledged principles of statutory construction to be strictly construed, but rather that it was a codification of existing law, and to be liberally construed to effect its purpose. (50 Am. Jur., Statutes, Sections 345, 346 and 402). The Court recognized that to construe the statute so as to restrict the right would result in the precipitation of bankruptcies which might otherwise be avoided, by discouraging creditors from entering into extension agreements or other work-out arrangements with their debtors, and that this is contrary to the purposes of the bankruptcy statutes. The Court further specifically stated that the remedy for abuse of the set-off lies in the obligation of the trustee to sue and recover the amount of any credit created by the bankrupt for the purpose of effecting a preference, not in imposing limitations and restrictions on it; and that the set-off of mutual debts and credits is the right of the creditor and the obligation of the trustee, save only in exceptional circumstances.

In the case now before this Court, the Referee found, and it is conceded by the parties, that the Bankrupt filed its petition in bankruptcy on July 13, 1953; that on that date the Bankrupt owed the Bank \$11,000.00 on an unsecured promissory note; that the Bankrupt had had on deposit with the Bank in its commercial account the sum of \$2889.14; and that on July 14, 1953, the day after the petition in bankruptcy was filed, the Bank set off the sum of \$2889.14 of its debt owing from the Bankrupt against the balance in the Bankrupt's account. Assuming, without conceding, that the extension granted by the Bank was such as to give the Bankrupt's debt the status

of an unmatured obligation, it is well settled, and we are not advised of any contrary authority, that the right of set-off is equally applicable to matured and unmatured debts when exercised after the petition in bankruptcy has been filed. Remington on Bankruptcy, Section 1472; Collier on Bankruptcy, 14th Ed., Vol. 4, Section 68.10. On the fact alone of the mutual obligations of the Bank and the Bankrupt each to the other, the statute and the cases to which reference is hereinabove made require that the one obligation be set off against the other.

It is also conceded that at the time the Bank granted the conditional extension of time described in the Referee's Order Disallowing Claim the Bank could have exercised its right of set-off against the then balance in the account. This was an amount considerably greater than that in the account at the time the right was actually exercised. Mr. Baines, attorney for the Bankrupt, testified that if the Bank had not granted this conditional extension, bankruptcy would have then immediately ensued (Transcript of Record, page 41). This is exactly the result the United States Supreme Court foresaw, and decried, in the case of *Studley vs. Boylston National Bank of Boston*, 1913, 229 U. S. 523, 57 L. Ed. 1313, to which reference is hereinabove made.

Unless, therefore, the Bank is held to have lost its right of set-off merely because, instead of exercising the right immediately, it granted the Bankrupt an opportunity to work out its difficulties, subject only to the condition that the obligation of the Bankrupt owing to the Bank be paid in ten equal monthly installments—a

condition to which the Bankrupt agreed and which it did not keep—then the Bank most certainly had that right when it was exercised in July, after the breach of the condition by the Bankrupt and after the filing of the petition in bankruptcy.

We respectfully submit that the Findings of Fact do not paint an extraordinary situation bespeaking of waiver, estoppel or trust fund. On the contrary, there is not, in the Findings of Fact or evidence, any possible basis for the contention that the granting of such a conditional extension constituted either a waiver of the right or was conduct such as to estop the Bank from exercising it. Any such rule would necessarily require banks to refuse any request for an extension of time or other indulgence if there was any possibility of bankruptcy ensuing; and this, in the words of the United States Supreme Court, “would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence”. *Studley vs. Boylston National Bank of Boston*, 1913, 229 U.S. 523, 57 L. Ed. 1313.

It is important at this juncture to remember that the extension made by the Bank was a conditional one, that it would not press for immediate payment of the obligation owing it “providing that the monthly payments of ten per cent were made”, (Transcript of Record, page 18, paragraph No. 5); and that set-off was not in fact made until July 14, 1953, after the Bankrupt had breached this condition by failing to make the June payment and after it had filed its petition in bankruptcy.

The statute and cases initially require that the mutual obligations of the Bank and the Bankrupt each to the other be set off one against the other. If this mandate is not to be followed, the burden is on him who would defy it to justify his action. The Trustee, in fulfillment of this obligation to show why this statutory requirement should be ignored, has asserted that the Bank is estopped to exercise it, that the Bank has waived it and that the bank account maintained by the Bankrupt was in reality a special account and partook of the nature of a trust account. Each of these contentions will be discussed in detail, but in considering them it should be remembered that the burden is on the Trustee to establish the truth of his assertions; not on the Bank to establish that they are false. We submit that, as the facts and discussion will show, the Trustee has utterly failed to show any facts or any reason why the clear and unequivocal mandate of the statute should not be followed. On the contrary, all of the facts and evidentiary material before this Court support the Bank's exercise of its right and its demand that its claim be allowed.

Proposition II.

The Bank's conduct was consistent in every respect with its assertion of its right of set-off. There was no misrepresentation or breach of duty upon which an estoppel might be based. There was no clear and unequivocal conduct evidencing a waiver.

19 Am. Jur., Estoppel, Sec. 34 and 36;

31 C.J.S., Estoppel, Sec. 59 and 61;

Remington on Bankruptcy, Vol. 4, Sec. 1442;

Germania City, etc., Bank vs. Loeb, 188 F. 285;
 appealed; appeal dismissed 58 L. Ed. 470;
 In re Myers, 99 F. 691;
 Chassen vs. United States, 1953, 2nd Circuit, 207
 F. 2d 83.

Equitable estoppel is generally defined as the principle whereby a person is precluded from stating the truth, and arises where such person has by his actions, representations or admissions induced another to believe that certain facts exist and such other rightfully relied on the acts, representations or admissions and would be prejudiced by permitting the party to assert the truth. It requires an act, representation or admission, or silence when there is a duty to speak, rightful reliance by another and prejudice to such other by assertion of the truth. Without the concurrence of all three elements there is no estoppel.

19 Am. Jur., Estoppel, Sec. 34;
 31 C.J.S., Estoppel, Sec. 59.

There is nothing in the findings of fact, or in the transcript, that supports the conclusion of law that the Bank is estopped to assert its right of set-off. The extension of time granted by the Bank, as found by the Referee, was that it would not press for the immediate payment of the obligation owing it, "providing that the monthly payments of ten per cent were made." (Transcript of Record, page 18, paragraph No. 5). There is no contention, nor is there any evidence, that any other representation was made by the Bank at any time to any person. Thus the first requirement of an estoppel is not present, and, without a misrepresentation of

some kind, there can be no estoppel. Also there is no evidence of any reliance by any party on any conduct of the Bank and there is no evidence that any person changed his position to his prejudice in reliance upon any conduct of the Bank. In short, there is no evidence that will support any of the three required elements of estoppel.

Waiver has been defined as the intentional relinquishment of a known right. It has as its basic requirement some clear and unequivocal conduct unmistakably evidencing an intention to relinquish a particular right.

19 Am. Jur., Estoppel, Sec. 36;

31 C.J.S., Estoppel, Sec. 61;

Remington on Bankruptcy, Vol. 4, Sec. 1442.

In the case before this Court the Referee found that the Bank had stated it would refrain from pressing the Bankrupt "for immediate payment in full of the indebtedness due it, providing that the monthly payments of ten per cent were made." (Transcript of Record, page 18, paragraph No. 5). The strongest construction against the Bank of which this is subject is that the Bank could not press for immediate payment of the obligation for so long as the payments of ten per cent per month were made. If it is so construed, it is still true, and the Referee so found, that the Bankrupt did not make the payment required by it to be made on June 15, 1953 and, further, that the Petition in bankruptcy was filed on July 13, 1953, the day before the set-off was made. The Bank had every right under the extension as found by the Referee to set off the balance in the Bankrupt's account on July 14, 1953, the date the right was exercised.

Further, it was the understanding of Mr. Lynn, the is not present, and, without a misrepresentation of Vice President and Manager of the Livestock-Kenton Branch of the Bank, that, if he considered the Bankrupt's condition to be acceptable each month, he would accept the tendered monthly payment (Transcript of Record, p. 63); and that he could, at any time he saw fit, proceed to enforce collection of the full balance of the obligation then owing from the Bankrupt (Transcript of Record, p. 68). These are not the ingredients of an "intentional relinquishment of a known right". An example of waiver as applied in bankruptcy is *In re Myers*, 99 F. 691, where the bankrupt owed the bank \$5000.00 on an unmatured debt. The bankrupt had a commercial account of \$777.00 with the bank at the time of his bankruptcy, and at that time the bank transferred this commercial account into the name of the trustee and filed its proof of claim for the full amount of \$5000.00. Thereafter the bank filed a petition for leave to amend its proof of claim to set off the sum of \$777.00, and filed a new claim for \$4223.00. The referee denied the petition and the Circuit Court reversed. The court observed that a waiver is an intentional relinquishment of a known right, and that there is no waiver where there has been a mistake of either law or fact. The petition averred that there had been a mistake both of law and of fact in that the cashier did not know he had the right of set-off at the time he filed the original claim for \$5000.00, and that there was some indication that he had not been advised of the balance of the outstanding obligation. The court continued that no one had been prejudiced, no one had changed his position so

that the allowance of the petition should be denied, and that therefore the petition and the set-off should be allowed.

In addition to the requirement that there must be an intentional relinquishment of a known right, the courts have stated that, at least with reference to bankruptcy matters, a "waiver" may be retracted unless someone has relied on it to his prejudice. The court indicated this to be true in *In re Myers*, 89 F. 691, and it was reiterated in *Chassen v. United States*, 1953, 207 F. 2d 83. In that case the United States inadvertently paid the Trustee in Bankruptcy refunds for taxes in the amount of approximately \$35,000.00. At that time the United States had on file a proof of claim for \$24,000.00, which proof of claim recited, among other things, that there were "no set-offs or counterclaims". An amendment of the claim was filed after the period for filing claims had expired. The question was whether the amendment of the proof of claim made in the month following its filing, and after the expiration of the statutory period for the filing of claims, was valid. The court held that it was, inasmuch as no one "had changed his position to his detriment in reliance on the previous failure to state the facts" (207 F. 2d at p. 83). The observation was made in the opinion that the allowance of the amendment did not turn on the fact that the claimant was the United States.

In the case before this court, it is apparent that the conclusion that the Bank waived the right of set-off is wrong.

Proposition III.

The Bankrupt's account was a general commercial account subject at all times to its unrestricted order. It was not at any time a special deposit or trust fund, nor did it partake of any of the characteristics of either.

Zollman, Banks and Banking, Vol. 5;
 Michie, Banks and Banking, Vol. 5 b;
 Union Bank & Trust Co. of Helena, Montana, vs. Loble, 9th Circuit, 1927, 20 F. 2d 124;
 Citizens National Bank of Gastonia vs. Lineberger, 4th Circuit, 1930, 45 F. 2d 522;
 Killoren vs. First National Bank in St. Louis, 8th Circuit, 1942, 127 F. 2d 537;
 Craig vs. Bank of Granby, 1922, 210 Mo. App. 334, 238 S.W. 507.

A deposit in a bank is presumed to be a general deposit, and the burden is on him who would seek to establish otherwise to rebut the presumption.

Zollman, Banks and Banking, Vol. 5, Sec. 3156, 3593;
 Michie, Banks and Banking, Vol. 5 b, Sec. 328;
 Killoren vs. First National Bank in St. Louis, 127 F. 2d 537.

Where a depositor has had a long history of general deposits and has maintained a general account, there must be a clear and explicit direction by the depositor accepted by the bank to effect a change of the deposit from a general account to a special account.

Zollman, Banks and Banking, Sec. 3156;
 Michie, Banks and Banking, Sec. 328 and 330.

The fact that an account is subject to the unrestricted drawing by check by the depositor is evidence that it is a general account.

Michie, Banks and Banking, Sec. 334;
Killoren vs. First National Bank in St. Louis, 127
F. 2d 537.

Inasmuch as the Bankrupt's account was a general commercial account in its inception and continued as such during its entire existence, the burden was, and is, on the Trustee to show wherein it was changed. The Trustee did not discharge this burden. The undisputed finding of fact of the Referee is that the Bankrupt opened a general commercial account with the Bank in 1946 and that it "continued in existence without change except as to the amount thereof, to and including the date of the exercise by said Bank of its asserted right of offset" (Transcript of Record, page 19). There is not a scintilla of evidence to the contrary. Appellant's Exhibit 5 (Transcript of Record, page 61) shows a consistent pattern of unrestricted withdrawals until the account was finally closed in July of 1953. Mr. Lynn, Vice President of the Bank and Manager of the Branch at which the Bankrupt's account was maintained, testified that the nature of the account remained unchanged from its inception and that it was always absolutely subject to the order of the Bankrupt (Transcript of Record, pages 60, 62). The account was in all respects the same as any other general commercial account.

In the case of *Union Bank & Trust Co. vs. Loble*, 1927, 20 F. 2d 124, which is more fully discussed later in this brief, this Court held that the account there, also denominated by the parties as a general commercial account, had acquired the characteristics of a trust fund. Although the account was called a general commercial ac-

count, it was not in fact, inasmuch as at the inception of the account limitations were placed on the right of the depositor to withdraw from it. It was created by agreement between the parties to receive the proceeds of a special sale to be held by the bankrupt. Under the agreement, the funds could only be used to pay current expenses and certain eastern creditors. They could not be used to pay certain local creditors. This court rightly held that the Bank could not divert the funds in a manner contrary to the agreement. The distinction between the *Loble* case and the case before this Court, where the account was in all respects a general commercial account unrestricted in any way, is apparent.

In *Citizens National Bank of Gastonia vs. Lineberger*, 1930, 4th Circuit, 45 F. 2d 522, a set-off was allowed under the following circumstances:

The Kirby-Warren Company, hereafter called "Company", found itself in financial difficulty in March of 1927. On March 12th Messrs. Kirby and Warrent, the sole officers and stockholders of the Company, and personally solvent, met with the president of the plaintiff bank, who was the brother-in-law of Kirby, and their attorney, who was a director of the bank and a member of its finance committee. The Company owed the bank some \$14,700.00. It was decided at this meeting to write a letter to all creditors offering to compromise the claims of the Company for 25% of their face value, and to call a meeting for March 24th to consider this proposal.

On March 14th the bank collected \$2100.00 on a \$4500.00 overdue note, of which Kirby was an endorser.

\$600.00 of this collection was the balance in the Company's account and \$1500.00 was the proceeds of a loan obtained by Kirby from the bank which he used to pay his indebtedness of \$1500.00 to the Company. The Company in turn used this money to pay the Bank.

The Bank continued to accept deposits by the Company in its general account and continued to honor checks drawn by the Company on this account throughout the month of March. On April 1, 1927, the Company filed a voluntary petition in bankruptcy and on the same date the bank set off the balance in its account, which had all been accumulated during the month of March, against the indebtedness owing it. The court held, in a well-reasoned opinion, that the collection of the \$2100.00 was proper and that the set-off of the balance in the account was proper. With reference to the contention that the deposits made during the month of March were a trust fund, the court had the following to say at page 531 and following:

"We have carefully considered the trust fund theories urged by the learned counsel for the trustee, but we do not think that they are applicable. If the letter to creditors had promised that moneys collected should be kept segregated and should be deposited in a special account for the benefit of creditors, an express trust would have arisen which could have been enforced against the bank if it had had notice of the trust. The letter, however, promised merely that the assets of the company would be protected and preserved in the interest of creditors pending consideration of the offer of compromise, which falls far short of the language necessary to create a trust. As a matter of fact, it promised nothing except what the law required in the absence of promise.

"It is true that the assets of an insolvent corporation which has suspended business constitute a trust fund for the benefit of its creditors; but in the case at bar the company did not suspend business until April 1st, after the deposits in question had been made, and after the right of set-off on the part of the bank had accrued . . . Even though a corporation be insolvent, it does not lose the right of doing business in the ordinary way with a bank, nor does a bank in doing business with it relinquish any of its ordinary rights or remedies. If there were showing that the deposits in question were made fraudulently or collusively, as a cloak for payments to the bank or as a means of giving it security, the trustee could avoid them under the Bankruptcy Act, without resort to the trust fund doctrine, if the bank were shown to have been a party to the fraud or collusion, or to have accepted the deposits as a means of obtaining payment or security."

In the case before this Court there was never any agreement, express or implied, that this account was intended to be a trust fund, or restricted in any manner. It was the sole property of the Bankrupt. There was never any restriction of any kind on the Bankrupt's right to withdraw from it. It was not designated to be used for any special purpose and it had none of the characteristics of a trust fund. It was a general commercial account subject to all the rules applicable thereto, as specifically found by the Referee in his Findings of Fact.

If under such circumstances it is to be held that the Bank had no right of setoff, then it is difficult to imagine a situation in which such right exists, unless this court is to hold, as a matter of law, that, in order to preserve its right of set-off, a bank must refuse to grant any ex-

tensions of time or other indulgence or to cooperate with a debtor in any respect. Such a rule would be contrary to law and the decisions of our courts, would tend to increase greatly the number of bankruptcies and would result in conditions exactly contrary to those which are admittedly to the best interests of all of the interested parties, particularly the debtor.

Killoren vs. First National Bank in St. Louis, 1942, 8th Circuit, 127 F. 2d 537, is of particular interest because, on facts substantially more in favor of the adoption of the "trust fund theory" than those presented in the case before this Court, the court held, decisively, that there was no trust fund. The suit was brought in equity by the trustee of the Hamilton-Brown Shoe Company, hereafter called the "Company", to impress a trust upon the funds of the bankrupt in the hands of the First National Bank of St. Louis, hereafter called the "Bank". The Trustee alleged that the Company had deposited approximately \$27,000.00 in its account with the Bank for the specific purpose of meeting its payroll. The deposit was made on April 14, 1939. On April 17, 1939, the Bank set off the balance in the account against the indebtedness owing from the Company to it. The Bank denied that any special deposit was made, and the court so found. It was held that the set-off was proper. At page 542, the court made the following observations:

"Not only did the depositor in the instant case not indicate an intention to create a trust or a special deposit subject to use for a specific purpose, but the evidence shows that the bank did not understand that the depositor intended so to do, or that it intended to enter into any special relationship. Noth-

ing was done to indicate that the relationship of debtor and creditor which had before existed was to be changed into a different relationship.”

The observation made by the court in the case of *Killoren vs. First National Bank in St. Louis* is particularly appropriate to the case now before this Court. There is nothing in the findings of fact or in the record to indicate that the relationship of debtor and creditor, which had existed since the establishment of the account, was to be changed; or that the funds then or thereafter credited to the account were subject to any restrictions or understanding of any kind. We earnestly submit that the conclusion of the Referee, affirmed by the District Judge, that the account bore the characteristics of a trust fund is without factual support and is contrary to law.

Proposition IV.

The case of *Union Bank & Trust Co. of Helena, Montana vs. Loble*, 9th Circuit, 1927, 20 F. 2d 124, does not constitute any authority or justification for the denial of the Bank's right of set-off in this case.

The Trustee has contended that the case presently before this Court is so similar to *Union Bank & Trust Co. of Helena, Montana vs. Loble*, 20 F. 2d 124, decided by this Court in 1927, as to be controlled by it. For convenience, the case will be referred to as the “Loble” case.

The facts in the Loble case as found by the District Court and reported in 14 F. 2d at page 116 are as follows:

"The evidence is that early in December, 1925, the bankrupt owed the bank \$10,000 upon a 90-day renewal note and \$1,300 upon an overdraft, owed \$35,000 to relatives of its president manager and \$16,000 to Eastern supply houses, was without funds, insolvent, pressed by creditors, suspension of business imminent, and in extremis. Thereupon its president-manager was ousted by Loble, son of the principal creditor relative, and various conferences followed between Loble, for the bankrupt, and McKinnon and Bogart, for the bank.

"The outcome was an agreement that the relatives and bank would refrain from pressing their claims, an extraordinary sale of the bankrupt's stock in trade would be had, and the proceeds would be deposited in the bank and devoted to payment of urgent Eastern creditors, all in the hope and to the end that continued credit and supplies might be secured, solvency restored, and all creditors finally paid. Despite some conflict in details, there is none that the plan was the bank's and the agreement made upon its insistence. This agreement was so far executed that the sale was had, and thereafter and to January 25, 1926, when the voluntary petition for adjudication was filed, the deposits served to extinguish the overdraft, to pay some \$6,000 of the bankrupt's checks for current expenses and other accounts, and to accumulate a residue of \$8,378.56, which on the date last aforesaid the bank applied in payment upon the bankrupt's note aforesaid. (emphasis added)

"In the meantime, however, the bank had refused to permit the use of the deposits to pay the Eastern creditors, and none such were paid; that is to say,

the bank repudiated the agreement, the contract by which alone the bankrupt's assets were converted into money and deposited with the bank." (emphasis added)

This court, in accepting the facts as found by the referee and affirmed by the district court, made the following statement: (20 Fed. (2d) at p. 125)

"Accepting the relevant facts as found by the referee and affirmed by the District Court, the case here presented is, in brief, one in which the bankrupt, upon consultation with the bank and acting upon its advice, made a special sale of merchandise to raise money for the purpose of paying demands of Eastern creditors, and facilitating the continuation of the bankrupt business, in the expectation of reorganizing the same under an arrangement whereby relatives to whom the bankrupt was indebted were expected to take stock therein."

After observing that there was no evidence that the bank advised the holding of the special sale with the view to obtain a preference, this court continued as follows: (20 Fed. (2d) p. 125)

" . . . While the money was in its (the bank's) possession on deposit, the bank placed no obstacle in the way of its disbursement to Eastern creditors until early in January, when it became apparent that the suggested plan of reorganization had failed. Thereafter the bankrupt presented to the bank a proposition to compromise with all creditors on the basis of 25 cents on the dollar. The bank denied the bankrupt's right thus to use the money on deposit, and asserted its own claim of lien thereon. On the following day the bankrupt filed its voluntary petition in bankruptcy." (parenthesis added)

Following is an outline comparison of the facts in the Loble case as reported by the District Court in 14 F. 2d

at p. 116 and by this Court in 20 F. 2d at p. 124, and the undisputed facts in this case as found by the Referee:

Loble case

1. At the time of the agreement the Bankrupt owed the Bank \$10,000 on a 90-day renewal note. It is not stated whether the note was in default.

2. The Bankrupt not only had no balance in its account, it was indebted to the Bank on an overdraft in excess of \$1,000.

3. After a series of conferences initiated by the Bank, a plan formulated and presented by the Bank was adopted at the insistence of the Bank, resulting in an agreement between the Bankrupt, the Bank and creditor-relatives of the Bankrupt's management.

This case

1. At the time the extension was granted the Bankrupt owed the Bank \$20,000 on a note which was in default.

2. The Bankrupt had a balance in its account ranging from \$8165.79 to \$22,301.09 during December, 1952. The exact date of the discussion between the representatives of the Bankrupt and the Bank is not in the record.

3. The Secretary-Treasurer of the Bankrupt and its attorney called on an officer of the Bank to advise him of the Bankrupt's financial condition. They suggested that if the excessive inventory were liquidated in the normal course of business, rather than as salvage stock, they thought the corporation would be able to continue its operation. They suggested that the Bankrupt make quarterly payments to its creditors of its outstanding obligation. The Bank stated that quarterly

payments would not be acceptable, but that if the Bankrupt made payment in liquidation of its obligations owing the Bank of 10% per month commencing in January 1953, the Bank would defer any action on the obligation, but only for so long as the monthly payments were made.

4. The agreement between the Bankrupt, the Bank and the creditor-relatives was:

(a) To have an extraordinary sale;

(b) The proceeds of the sale to pay "urgent Eastern creditors" (14 F. 2d 117). The purpose of the sale was to create a particular fund for a particular purpose.

(c) To deposit the proceeds of the sale in the Bank.

5. At the date of the exercise of the right of set-off, the Bankrupt's account had increased from approximately a \$1,000 deficit to an \$8,378.56 credit.

6. A fund was created by the operation of the agreement.

7. The Bank refused to allow the funds to be used

4. There was no agreement in the sense the term was used in the Loble case. The Bank granted an *extension of time* to the Bankrupt within which to liquidate the obligation, expressly conditioned on the prompt payment by the Bankrupt of 10% of the obligation each month commencing January 15, 1953.

The extension agreement did not earmark the deposit for any particular purpose.

5. At the date of the exercise of the set-off, the Bankrupt's account had decreased from a sum between \$8,000 and \$22,000 to \$2,889.14.

6. An existing fund was depleted during the liquidation program adopted by the Bankrupt.

7. The Bankrupt failed to comply with the condition

to pay Eastern creditors, as contemplated by the agreement, (14 F. 2d 117) apparently because the Bankrupt had presented an alternative plan to it involving the payment of 25% to each creditor. (20 F. 2d 125) The Bank breached the agreement by diverting the funds in the account (which had been created for a special purpose) to its own use, contrary to the agreement.

8. The Bank asserted the setoff before the petition in bankruptcy was filed.

9. The account was created for a specific purpose and the bankrupt was expressly limited by the agreement between the parties from making any withdrawals from it except as authorized by the agreement.

on which the extension of time was granted by not making the June payment, and by filing its voluntary petition in bankruptcy.

8. The Bank exercised the set-off after the petition in bankruptcy was filed.

9. The account was created some six years prior to the financial difficulty of the Bankrupt and continued until the right of set-off was exercised. As specifically found by the Referee, there was no change of any kind in the account or the manner in which or the terms upon which it was operated or maintained.

The extension agreement did not provide that the future deposits should be used for any specific purpose.

The distinction between the cases is apparent. In the Loble case the fund against which the right of set-off was exercised was created by the operation of an agree-

ment formulated by and adopted at the insistence of the Bank and with which agreement the bank ultimately refused to abide. In this case a substantially larger fund, perhaps sufficiently large to completely eliminate the indebtedness owing the bank, was in existence on the date the extension was granted and was at that time subject to the exercise by the Bank of its right to set-off. The plan, to the extent that it was a plan, was developed by the Bankrupt and the only thing that the Bank did was to agree to extend the maturity of its own note as long as the stipulated installments were paid at the times and in the manner designated. If such an extension of time constitutes a waiver of a right of set-off, then it necessarily follows that the only manner in which a bank can preserve this right is to exercise the right at the first opportunity regardless of the consequences!

The courts have consistently regarded the Loble case as advancing the proposition that a creditor that requires the adoption of a plan formulated by it, the result of the operation of which plan creates a fund earmarked for a particular purpose and which fund, except for the operation of the plan, would not have been created, cannot thereafter be permitted to appropriate that fund to its own purposes and for its own benefit. It is quite apparent that this proposition is a correct one. But it is not a correct statement of the law to say that any agreement to defer the collection of an obligation that is due and owing, no matter upon what terms the agreement may be conditioned, is an absolute waiver of the right to enforce collection of that obligation. Nor does the Loble case so hold.

It is equally clear that none of the elements of a trust fund are here involved because there was never any understanding to apply the depositor's account for any specific use.

The Ninth Circuit, the Court which decided the Loble case, advanced this interpretation of this case in *Ingram vs. Bank of Cottage Grove*, Or. 1928, 29 F. 2d 86. In explanation of the Loble case, the court said, at page 87:

“True, it was held in the Loble Case that the bank waived, or was estopped to assert, its right of set-off, because of an agreement between the bank and the bankrupt that certain moneys derived from a special sale conducted by the bankrupt and placed on deposit in the bank should be paid to certain eastern creditors, but there is no basis for any claim of waiver or estoppel here.”

It is important to note in the case before this Court that there was no agreement of any kind that the Bankrupt's account should in any way be affected by the agreement between the Bankrupt and the Bank. On the contrary it is the express finding of the Referee at paragraph 7 of the Order Disallowing the claim (Transcript of Record, page 19) that:

“7. That in 1946 the bankrupt opened with The First National Bank of Portland a general commercial account in which unrestricted deposits were made subject to withdrawal by check in the ordinary course of business. This account was in existence at the time of the creation of the loan upon which the claim of the Bank is based and continued in existence without change, except as to the amount thereof, to and including the date of the exercise by said Bank of its asserted right of offset. The activity

in the account and the high and low monthly balances for the period from January, 1951, through June, 1953, are shown in Exhibit 5, which is included by reference herein as a part hereof. The deposits in and withdrawals from the account and the balances after each daily transaction in the account for the period of from November 29, 1952, until the account was closed, are shown in the copies of the bank statements which are Exhibit 6, and which is included by reference herein as a part hereof."

The Bankrupt's account was not in any way changed nor was any restriction of any nature placed on its right to use the funds for any purpose it saw fit. There is certainly no analogy between this state of facts and the explanation given by the Ninth Circuit in the Ingram case of its decision in the Loble case that the bank "waived, or was estopped to assert, its right of set-off, *because of an agreement between the bank and the bankrupt that certain moneys derived from a special sale conducted by the bankrupt and placed on deposit in the bank should be paid to certain eastern creditors . . .*" (29 F. 2d 87 — emphasis supplied).

The Ingram case is of further interest because the court there held that the bank was entitled to exercise its right of set-off on a state of facts which we submit is less favorable to the bank than are those presented in this case. In that case the bankrupt operated a general merchandise business in Cottage Grove. On June 22, 1927, he was heavily involved and went to Portland for the purpose of conferring with the Portland Association of Credit Men. After some discussion, it was agreed that a note secured by a mortgage on his stock should be

executed by the bankrupt pending efforts to obtain an extension of credit from his creditors, the extension to be until January 1, 1928. A note and mortgage were executed, but for some reason the indebtedness due the bank of Cottage Grove was not included; and it was not until June 28th that the bank was advised of what had happened. The president of the bank and the manager of the Bureau had some discussion in which the bank indicated it did not favor the existing arrangement and during which such discussion it was agreed that the bank president should go to Portland to discuss the matter further.

Nothing further was done until July 22nd. From June 22nd until July 22nd the bankrupt made deposits in the amount of about \$2100.00 and drew checks in the usual course of his business in the amount of about \$1300.00. On July 22nd, immediately prior to leaving for Portland, the president of the bank directed the Cashier to charge off \$600.00 of the amount on deposit as a set-off of the amount owing the bank. On July 25th and additional \$150.00 was set off.

The Referee found that the Bank was entitled to set off the \$600.00, but was not entitled to set off the \$150.00. The trustee appealed the allowance of the \$600.00 set-off. The bank did not appeal the disallowance of the \$150.00 set-off. The decision of the Referee in allowing the \$600.00 set-off was approved by the District Judge and affirmed by the Circuit Court.

After a recital of the foregoing facts, the court continued as follows (29 F. 2d p. 87):

“From the facts as found by the referee and approved by the District Judge, the deposits in the appellee bank were made by the bankrupt from time to time in the ordinary course of his business, and were checked out by him in the same manner. The deposits were not made for any specific purpose, nor were they subject to a trust of any kind. There was no fraud or collusion between the bankrupt and the bank, and it does not appear that the deposits were made for the purpose of enabling the bank to gain a preference. Under somewhat similar facts in *Union Bank & Trust Co. v. Loble* (C.C.A.) 20 F. (2d) 124, this court said:

“ ‘The balance of a regular bank account at the time of filing the petition in bankruptcy is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against the bankrupt’s debt to it.’

“We there quoted with approval from *In re Almond-Jones Co.* (D.C.) 13 F. (2d) 153, as follows:

“ ‘The question then arises whether the bank was justified in applying the moneys deposited after it had knowledge of the company’s insolvency to the payment of its note. The solution depends upon the purpose with which the deposits were made and accepted—whether they were made in the ordinary course of business, with the expectation and intent that they might be withdrawn at will by the bankrupt, or whether, on the other hand, they were made to build up the account, so that it would be applied to the payment of the bank’s claim . . . In these cases it is laid down that, in the absence of fraud or collusion between the bank and the depositor, with a view of creating a preferential transfer, the bank need not surrender the balance in the bank account at the time of the filing of the depositor’s petition in bankruptcy, but may set it off against the deposit-

or's indebtedness and prove its claim for the amount remaining due.'

"True, it was held in the Loble Case that the bank waived, or was estopped to assert, its right of set-off, because of an agreement between the bank and the bankrupt that certain moneys derived from a special sale conducted by the bankrupt and placed on deposit in the bank should be paid to certain eastern creditors, but there is no basis for any claim of waiver or estoppel here.

"The order is therefore affirmed."

The limitation of the Loble case to the state of facts where a fund is created by a plan formulated by and adopted at the insistence of the creditor and thereafter appropriated by the creditor in a manner and for a purpose contrary to the plan is further recognized by the Eighth Circuit in the case of *Killoren vs. First National Bank of St. Louis*, 1942, 127 F. 2d 537. There the court made the following reference to the Loble case, beginning at page 543:

"In *Union Bank & Trust Co. of Helena v. Loble*, supra, the bankrupt owed \$16,000.00 to Eastern supply houses, owed relatives of its president \$35,000, and owed local creditors \$12,000. It was also indebted to the bank in the sum of \$10,000 on a ninety-day note and in the sum of \$1,300 on an overdraft. It was insolvent and without funds. The bankrupt discussed with the president of the bank the question of discontinuing the business, but upon the bank's advice it was agreed that a special sale should be conducted by the bankrupt to raise money to pay Eastern creditors, with a view of reorganizing and continuing the business, and that the relatives and the bank would refrain from pressing their claims. The court found that this plan was the bank's own plan and the agreement above referred

to was made upon the bank's insistence. Pursuant to this plan the sale was held and the proceeds turned into the bank. The bank paid out about one-third of the money realized from the sale, but none of it was used to pay the Eastern creditors, but was used largely to pay some of the local creditors who were relatives, and to pay current expenses and the bank's overdraft of \$1,300.00. There was a residue of about \$8,300 on the date a voluntary petition in bankruptcy was filed, and on the same date the bank applied this balance on its note. The trial court held that the deposit was in the nature of a special deposit brought about by the bank under an agreement that it was to be devoted to certain purposes, and that, 'By breach of contract a trust cannot be converted to a debt, the title to special deposits cannot be transferred, and set-off against them cannot be had by the defaulting contractor.' In *re Gans & Klien*, D.C., 14 F. 2d 116, 117. The Circuit Court of Appeals, 9 Cir., 20 F. 2d 124, 126, in affirming the lower court, expressed the view that, ' . . . the circumstances under which the fund was created, and the co-operation of the bank and the bankrupt in its creation were sufficient to so far impress upon it the character of a trust fund that the bank should be held estopped to assert a lien thereon or the right of set-off.' "

In the Killoren case, the plaintiff was trustee of the Hamilton-Brown Shoe Company, hereafter referred to as the "bankrupt". On April 14, 1939, the bankrupt deposited with the defendant about \$27,000.00, about \$26,000.00 of which represented a loan obtained by the bankrupt from the Commercial Factors Corporation, hereafter referred to as the "corporation", for the specific purpose of meeting a payroll of the bankrupt. There was some evidence that the defendant knew that the deposit was for this specific purpose.

About \$8,000.00 of the account was checked out by April 17, on which date the bankrupt filed its voluntary petition in bankruptcy and the defendant set off the remaining \$19,000.00 in the account against the bankrupt's indebtedness owing it.

The plaintiff trustee appealed from a judgment dismissing its complaint on the grounds:

“ . . . (1) That the bank had no right of set-off because it knew, or by reasonable investigation could have ascertained, the purpose of the deposit; (2) That the bank had no right of set-off even though without knowledge that another than the depositor had an interest in funds deposited in its name, where such lack of knowledge has not resulted in any change of the bank's position and if no superior equities have been raised in its favor; (3) That the right of set-off should not be allowed because to do so would give the bank a preferential advantage over other creditors.”

The court found that there was no agreement between the defendant and the bankrupt or the corporation that the \$27,000.00 deposit was to be used as a separate deposit, but to the contrary that it was deposited by the bankrupt with the defendant in the regular way, in the regular checking account, that it was subject to check by the bankrupt in the regular way, and that there had been no agreement, express or implied, that the account, including the \$27,000.00, should not be drawn against in the usual course of business.

The court overruled plaintiff's contentions and held that the defendant had rightfully exercised the right of set-off. The court also observed that this was not a trust fund. There was no indicated intent on the part of the

depositor to create a trust fund or to create a special deposit, or on the part of the defendant bank that such a deposit be created. Nothing was said or done to change the then existing debtor-creditor relationship. The court concluded its opinion with the quotation hereinabove on page 36 hereof set forth.

In the case of *Citizens National Bank of Gastonia vs. Lineberger*, 1930, 4th Circuit, 45 F. 2d 522, which case was more fully discussed under Proposition III of this brief, the court regarded the *Loble* case as holding that, because a special deposit had been created, the bank was estopped to assert its right of set-off. The court there stated, at page 530:

“In *Union Bank & Trust Co. vs. Loble* (C. C. A. 9th) 20 F. (2d) 124; *Id.* (D. C.) 14 F. (2d) 116, the deposits made were proceeds of a special sale, held on the advice of the bank, to raise funds for Eastern creditors. It was held that the circumstances under which this fund was created and the co-operation of the bank and the bankrupt in its creation so far impressed it with a trust as to estop the bank from asserting its right of set-off.”

The same emphasis was made by the Fourth Circuit in the case of *Twentieth Street Bank vs. Gilmore*, 1934, 71 F. 2d 594, where it observed that the *Loble* case was one “ . . . where the deposits were the proceeds of a sale to raise funds for Eastern creditors, and it was held that the circumstances under which the funds deposited were raised and the cooperation of the bank with the depositor so far impressed them with a trust as to estop the bank from asserting its right of set-off”.

The foregoing are the only cases of which we are advised where the Loble case has been cited and particular reference made to the nature of the case. It is clear that each of the courts, including this court, regarded the Loble case as one where the peculiar combination of a plan formulated and adopted by and at the insistence of the creditor caused the creation of a fund designed to be used for a particular purpose and to which the creditor should not be allowed to look for payment of its own obligation contrary to that purpose. None of these facts which have been regarded by all of the courts as being controlling in the Loble decision is present in this case. Contrary to the contention of the Trustee that the Loble case requires that the Bank in this case be denied its right to exercise the set-off specifically granted it by the statute and the cases, the Loble case requires that the right of set-off be allowed on the facts as found by the Referee.

CONCLUSION

When this matter was before the District Court, counsel for the trustee argued that an extension of time within which to pay a delinquent obligation operates as an absolute waiver of the right to proceed to the collection of the obligation for the duration of the extension, even though the extension is conditioned upon periodic payments on the delinquent obligation; and that the only way that the rights which the creditor had at the time the extension was granted could be retained was by *express reservation*. A conditional extension, such

as was granted in this case, is, according to the trustee, insufficient. We know of no law supporting such a statement. It is contrary to all the law of waiver and estoppel.

The effect of the trustee's argument is to create in the delinquent debtor who has obtained a conditional extension of time within which to pay his obligation, greater rights than he would have had if he had not allowed his debt to become delinquent; and this would be true even though the debtor did not keep the condition on which the extension was granted. Such a contention is preposterous.

If the Bankrupt's obligation in this case had been in a current condition, there would be no question but that the Bank would have had the right of set-off, and the exercise of this right would have gone unchallenged. But, because the debtor became delinquent and because the Bank granted an extension expressly conditioned upon regular periodic payments of the delinquent balance in liquidation of the debt, which condition was not kept by the debtor, it is asserted that the Bank is barred from exercising the right it concededly would have had if the obligation had been in a current and unmatured condition. None of the elements of waiver is present. None of the elements of estoppel is present. None of the elements of a trust fund or special deposit or quasi fiduciary relation, or of basic inequity, such as are in the Loble case, is present. The facts are not in any sense extraordinary or unusual. The question presented to this Court is whether a simple garden variety conditional extension of time within which to pay a delinquent obligation

operates as an absolute bar to the subsequent exercise by the creditor of the right of set-off, even where the condition has not been kept by the debtor. The simple answer to this proposition, when so presented, is that such a conditional extension of time is not a bar. It is the only answer.

The Honorable District Judge before whom this matter was heard on review asserted that he was " . . . not impressed as an original proposition that such a loose arrangement, as presented here, should work a loss of the Bank's right of set-off . . . " (Transcript of Record, page 27). It was the court's feeling, as evidenced by the Memorandum of Decision, that, inasmuch as the Referee regarded this case as being controlled by the Loble case, it would not be inappropriate for this Court, which decided the Loble case, to point out wherein the two cases may be distinguished. We feel it not inappropriate, also, to add that it was the suggestion of the Honorable District Judge that the whole record be submitted to this Court that caused us to have the transcript of testimony printed as a part of the printed record, even though the Findings of Fact as made by the Referee were not, and are not, contested.

We submit that, if the decision of the Referee is supported, a financially embarrassed person, whether corporate or individual, cannot look to a bank, or indeed to any creditor who is also a debtor, for an extension of time within which to attempt to work out his problem, or for any other assistance. A creditor would have no alternative but to deny the extension, or other assistance,

and exercise its then existing right of set-off; for by not so doing, he would be held to have lost that right, irretrievably, and without regard to whether any of the elements of waiver, estoppel, trust fund or similar special circumstances were present. This would obviously precipitate many bankruptcies which might otherwise be avoided. It would produce evils of a much more serious and far reaching consequence than were within the contemplation of the Supreme Court of the United States in 1913, when the case of Studley vs. Boylston National Bank of Boston, *supra*, was decided. It is patently wrong, and the cases unanimously so hold. The order of the District Judge is erroneous and should be reversed.

Respectfully submitted,

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United States
COURT OF APPEALS

for the Ninth Circuit

THE FIRST NATIONAL BANK OF PORTLAND,
a National Banking Association,

Appellant,

vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of the
Estate of Northwest Variety Wholesale, Inc.,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

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BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

STATEMENT OF PLEADINGS AND JURISDICTION

Northwest Variety Wholesale, Inc., a corporation, was, by order of the District Court of the United States, for the District of Oregon, upon its voluntary petition adjudicated on the 13th day of July, 1953, to be bankrupt. Thereafter the proceedings were refereed by order of general reference to Hon. Estes Snedecor, Referee in

Bankruptcy of said Court. The Appellant Bank filed its creditor's proof of claim, setting forth that it was a creditor of the Bankrupt in the amount of \$8,184.19. The claim so filed disclosed that the claimant Bank had, on July 13th, 1953, appropriated the sum of \$2,889.14, then standing to the credit of the Bankrupt in its bank account, toward payment of the indebtedness then due the Bank. The Trustee filed objections to the allowance of the claim of the Bank, claiming that under the circumstances of this case the Bank had no right to set-off said amount against its indebtedness, and asked that the Bank be required to return said amount to the Trustee as a condition to the allowance of its claim. The Bank filed its answer, claiming that it possessed the right of set-off, and upon hearing had, the Referee made his findings of fact and conclusions of law, and based thereon his order denying the claim.

A petition for review of the order of the Referee by the District Judge was filed pursuant to the provisions of United States Code, Title 11, Section 67(c), and, upon hearing of the petition for review, an order was made by the District Court affirming the order of the Referee. Jurisdiction of this Court is based upon the provisions of United States Code, Title 11, Section 47, being Section 24 of the Bankruptcy Act.

STATEMENT OF THE CASE

The findings of fact made by the Referee in his order disallowing claim of the Bank (Tr. 17-22) set forth in detail the facts of this case. These findings, as stated in Appellant's Brief (p. 42) were not and are not contested. During the months of November and December, 1952, the Bankrupt was indebted to the Bank upon a promissory note in the principal amount of \$22,000.00. During the month of November, 1952, the Bankrupt became unable to meet its obligations in the regular course of business as they became due, and by its president and its attorney advised the Bank of this condition. At that time the Bankrupt advised the Bank that it had a stock of merchandise which could be sold to advantage over a period of time, so as to liquidate the indebtedness owing by the Bankrupt corporation. The Bankrupt proposed to the Bank that if the creditors, including the Bank, would refrain from seeking immediate payment of their respective accounts in full, the Bankrupt would proceed to liquidate its inventory over a period of twelve months' time, and would pay to the Bank, as well as to other creditors, a quarterly payment of 25% of the indebtedness owing to the Bank and to such creditors, the first of said payments to be made on January 15, 1953.

The Bank proposed a modification in this plan whereby, instead of quarterly payments of 25% over a twelve months' period of time, monthly payment of 10% would be made to creditors, commencing with the month of January, 1953. The Bank agreed that the plan, as so modified, was a feasible one, which would enable

the Bankrupt to work out of its financial difficulties, and that the Bank would go along with the Bankrupt on the plan and refrain from pressing for immediate payment in full of the indebtedness due it, providing that the monthly payments of 10% were made.

The Bankrupt advised its other creditors of the plan, and advised a number of said creditors of the approval of the plan by Bank, and the participation of the Bank therein, and obtained participation of its other creditors in the plan, with the result that the Bankrupt was permitted to continue in business and proceeded with the liquidation of its inventory in accordance with the plan, and made 10% payments monthly to each of its creditors during the months of January, February, March, April and May, 1953.

At the time of the formulation and adoption of the plan the Bankrupt kept, and had for some time kept its bank account at the Bank. After the formulation of the plan the Bankrupt deposited all monies realized from the sale of its inventory in this Bank account, and drew checks upon it in payment of its operating expenses and made payment to its creditors by checks drawn upon the bank account, such payments being made in accordance with the plan to each creditor upon a pro-rata basis of 10% of their respective accounts during the months of January, February, March, April and May, 1953. During this period the Bank had knowledge that the plan was in progress, that the Bankrupt was operating thereunder and that all of the creditors of the Bankrupt had acquiesced in said plan and were receiving their monthly 10% dividends thereunder. At

the time of the commencement of the bankruptcy proceedings there remained in said bank account a balance resulting from said deposits, in the amount of \$2,889.14.

The Bank received and accepted the monthly payments of 10% of the principal of its note, together with accruing interest, in full during the five months referred to, and thereby reduced the principal amount of its note from \$22,000.00 to \$11,000.00. The accounts of the other creditors were reduced on the same pro-rata basis.

After the filing of the petition in bankruptcy in these proceedings, the bank appropriated toward payment of the indebtedness due it the balance of \$2,889.14 remaining in the bank account and filed its claim in the amount of \$8,184.19. The Trustee, by filing objections to the allowance of said claim, contested the right of the bank under the circumstances of this case to appropriate in partial payment the indebtedness due it, the balance of \$2,889.14 in the bank account of the Bankrupt above referred to. The Bank filed its answer to the Trustee's objections, and upon hearing being had, order was entered by the Referee based upon his findings above referred to, disallowing the claim of the Bank unless it surrender to the Trustee the bank account appropriated by it. This order, subsequently affirmed by the District Court upon review, was based upon the conclusions that by its approval of the Bankrupt's plan of payment of its creditors upon a pro-rata basis and by its participation therein, the Bank so dealt with its depositor, the Bankrupt, and with other creditors of the Bankrupt, as to waive or be estopped to assert the right to set-off of the deposits made by the Bankrupt against the indebtedness owing

to the Bank, and that the bank account of the Bankrupt, as it existed at the time of the commencement of the within bankruptcy proceedings, was created under such circumstances, with the cooperation of the Bank and the Bankrupt, as to so far impress upon it the character of a trust fund that the Bank should be estopped to assert a lien thereon, or the right of set-off.

ARGUMENT

Proposition I.

Application of 11 U.S.C.A., Sec. 108, Section 68a of the Bankruptcy Act, recognizing the right of set-off of the mutual debts or mutual credits between the estate of a bankrupt and a creditor will not be made if such application is not in accordance with the general principles of equity.

11 U.S.C.A., Sec. 108, Section 68a of the Bankruptcy Act;

Collier on Bankruptcy (14th Edition) Volume 4, page 710;

Cumberland Glass Manufacturing Company v. Charles DeWitt, 237 U.S. 447, 59 Law Ed. 1042;

Prudential Insurance Company of America v. Nelson (CCA 6th Cir.), 101 F. (2d) 441;

Union Bank and Trust Company of Helena, Montana v. Lester H. Loble, Trustee, 20 F. (2d) 124.

As proposition I of its brief, the Bank contends that a creditor has the right to set-off a debt owing by it to the Bankrupt against a debt owing by the Bankrupt to it; and, if the parties do not effect the set-off prior to

bankruptcy, it is the duty of the Trustee to do so after the bankruptcy. This rule is set forth by statute: 11 U.S.C.A., Sec. 108, Section 68a of the Bankruptcy Act. In a proper case it should, of course, be applied.

The Bank contends that this statute should be "liberally construed to effect its purpose." There is no authority for the construction of this statute in any more liberal manner than is required by its express provisions. On the other hand, there is considerable authority to the effect that the application of this statute is governed by principles of equity and fair dealing, depending on the facts of the particular case in which it is invoked.

In the text of Collier on Bankruptcy (14th Edition) Volume 4, page 710, it is stated:

"Despite the seemingly mandatory language of Section 68a, it has been stated frequently that the privilege of set-off under Section 68a is permissive, not mandatory; and that its application, when invoked before a Court, rests in the discretion of that Court which exercises such discretion under the general principles of equity."

In the case of Cumberland Glass Manufacturing Company v. Charles DeWitt, 237 U.S. 447, 59 Law Ed. 1042, the United States Supreme Court said of Section 68a of the Bankruptcy Act:

"The provision is permissive rather than mandatory, and does not enlarge the doctrines of set-off and cannot be invoked in cases where the general principles of set-off would not justify it. The matter is placed within the control of the Bankruptcy Court, which exercises its discretion in these cases upon the general principles of equity."

In the case of Prudential Insurance Company of America v. Nelson (CCA 6th Cir.), 101 F. (2d) 441, the Court said regarding the application of Section 68a of the Bankruptcy Act:

“In all cases of mutual debts, where the insolvency of one of the debtors and the rights of other creditors in the assigned estate are involved, equity intervenes and modifies the legal right of set-off in order to promote equality and justice.”

The above authorities and others to the same effect, do not lay down the principles that Section 68a of the Bankruptcy Act is to be “liberally” construed in order to allow the right of set-off claimed by a creditor of the Bankrupt, but, on the contrary, that it is to be construed in such a way as to promote equality and justice in accordance with the principles of equity. It was this rule that was applied by this Court in rendering its decision in the case of Union Bank and Trust Company of Helena, Montana v. Lester H. Loble, trustee, 20 F. (2d) 124, 126, where the Court said:

“But a bank may so deal with a depositor as to waive or be estopped to assert the right of set-off. *Michie, Banks and Banking*, 1027. And the right does not exist where the circumstances are inconsistent with its exercise. *Neponset Bank v. Leland*, 5 Metc. (Mass.) 259; *Reynes v. Dumont*, 130 U.S. 354, 9 S. Ct. 486, 32 L. Ed. 934. Nor where the principles of legal or equitable set-off do not authorize it. *Wagner v. Citizens' & Trust Co.*, 122 Tenn. 164, 122 S.W. 245, 28 L.R.A. (N.S.) 484, 135 Am. St. Rept. 869, 19 Ann. Ca. 483; *Furber v. Dane*, 203 Mass. 108, 89 N.E. 227; *Lyman v. Belfast Nat. Bank*, 98 Me. 448, 57 A. 799; *In re Davis* (D.C. Tex.), 9 Am. B.R. 670, 119 F. 950. On these grounds we think the decision of the Court below is sustain-

able. While the money realized on the special sale and deposited to the bankrupt's current account and subject to its check for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off, we are inclined to the view that the circumstances under which the fund was created, and the co-operation of the bank and the bankrupt in its creation, were sufficient to so far impress upon it the character of a trust fund that the bank should be held estopped to assert a lien thereon or the right of set-off."

The cases cited by Appellant in its brief, are cases where the right of set-off was properly granted. There were no considerations of equity and fair dealing involved. In the case of *Studley v. Boylston National Bank*, from which Appellant quotes at length (Br. pp. 9-10), there was no suggestion whatsoever of an arrangement or understanding of any kind involving the depositor, the bank, and other creditors. The right of set-off was apparently attacked in that case solely on the ground of the insolvency of the depositor at the time and the bank's knowledge thereof. It is now well established that the right is not vulnerable to such attack. The same is true of the other cases cited by Appellant.

The conclusions in the case at bar in no way controvert the right of set-off of the bank in the ordinary case of mutual debts. Appellant has argued that banking practice will be seriously affected, extensions discouraged, and bankruptcies precipitated in the event that such conclusions are affirmed. There would seem to be no foundation for such argument. All that is held in the case at bar, as in the *Loble* case heretofore decided by

this Court, is that a bank will be precluded from asserting a set-off where it enters into an arrangement with the depositor and his other creditors involving an extension of time to the depositor to pay his debts, and use of the assets of the depositor for the making of payments to creditors, including the bank, on a pro-rata basis. After such arrangement is entered into, it is not equitable that the bank should obtain payment of a larger proportion of its debts than the other creditors, by exercise of an alleged right to appropriate a portion of the assets of the debtor to payment of its own account to the exclusion of other creditors.

If bankruptcies are to be avoided in the case of embarrassed debtors and extension of time granted to them within which to satisfy their obligation, the participation of other creditors is just as important as that of the bank or banks involved. If such creditors understood that the bank might at any time appropriate to itself the monies placed on deposit with it, with which monies the depositor intended to make pro-rata payments to all in accordance with his agreement, then the participation of creditors would indeed be difficult to obtain. To quote further from the opinion of this Court in the Loble case:

“Applicable to the case is the language of the Court in *Union Trust Co. v. Peck* (C.C.A.) 16 F. (2d) 986: ‘It is, moreover, to be noted that, before and at the time the bank applied these amounts to its own use, it, the bankrupt, and other creditors were conferring as to the possibility of keeping the bankrupt upon its feet as a going concern by securing the general acceptance of a scheme of reorganization which contemplated the creditors taking less than was due them. Under such circumstances the

deposit by the bankrupt of large sums in the bank, which both it and the bankrupt intended should be used for the reduction of the former's debt, were obviously not made in ordinary course, in any fair sense of that phrase. Most men would feel that it is an implied term of such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien.' "

Proposition II.

In the case at bar, upon the facts found and admitted, the Bank was properly held precluded to assert a lien or the right of set-off upon the balance in the bank account of the Bankrupt at the date of the filing of the bankruptcy petition herein.

Union Bank and Trust Company of Helena, Montana v. Lester H. Loble, Trustee, 20 F. (2d) 124;

19 Am. Jur. Estoppel, Sections 34 and 35;

31 C.J.S., Estoppel, Section 61;

Re Mauch Chunk Brewing Company, 131 F. (2d) 48;

Wagner v. Citizens' Bank & Trust Co., 122 Tenn. 164, 122 S.W. 245;

Lyman v. Belfast Nat. Bank, 98 Me. 448, 57 A. 799;

In re Davis (D.C. Tex.), 119 F. 950;

Twentieth Street Bank v. Gilmore, 71 F. (2d) 594.

In proposition II of its brief, the Bank contends that it did not so act as to waive or become estopped to assert its right of set-off; in proposition III it contends that the account maintained by the bankrupt at the bank

was not at any time a special deposit or trust fund, nor did it partake of any of the characteristics of either. As in our view, the one question involved is whether, under all the facts of the case, the bank should be allowed to assert its alleged right of set-off, we will deal with these two propositions together.

As will be seen, the Courts in disallowing the right of set-off in certain cases, have not been concerned primarily with whether or not a waiver or an estoppel or a trust fund in the technical sense existed in the particular case. To be sure, in some cases estoppel or waiver or a trust fund in the strictly technical sense has existed. The primary question however, has always been; whether, under the facts of the particular case, it was equitable and in furtherance of the principles of equity and justice that the set-off should be allowed.

In its opinion in the Loble case this Court stated:

“A bank may so deal with the depositor as to *waive* or be *estopped* to assert the right of set-off.”

It is plain from the facts of that case, and the opinion of the Court, that the Court was not employing these terms in any technical sense, but was stating in effect, that the bank under the existing facts was precluded by general principles of equity and fair dealing from asserting such right.

The words “estopped” and “waived” are frequently employed in other than their strictly technical sense. They are words of ordinary usage, not confined to the law. In fact, as used in the field of the law, they are em-

ployed with different meanings in connection with different situations.

In the text of Am. Jur. cited by Appellant, on the subject of Estoppel, Sec. 35, it is stated:

“Equitable estoppel is distinguished from technical estoppel in that it arises out of the acts and conduct of the party estopped and not from a record or a deed. It differs also in certain particulars from various legal bars which are in some respects analogous to it and which have substantially the same practical operation and to which the term ‘estoppel’ is frequently applied, but which are more properly designated as ‘quasi estoppels’. Quasi estoppels include such matters as the doctrine of ‘election’, the principle which precludes a party from asserting to another’s disadvantage a right inconsistent with a position previously taken by him, waiver, ratification, and laches.”

In Sec. 36 of the same text it is stated:

“The terms ‘estoppel’ and ‘waiver’ are often used interchangeably, particularly with reference to situations arising under insurance policies. . . . The dividing line between estoppel and express waiver is not difficult to preserve, but the line is somewhat less distinct between estoppel and waiver implied from conduct.”

In the text of 31 C.J.S. on the subject of Estoppel, also cited by Appellant, in Sec. 61, in distinguishing estoppel from waiver, the text gives the following as one of the definitions of waiver:

“Waiver is the intentional relinquishment of a known right, or such conduct warrants an inference of the relinquishment of such right.”

It is further stated in the same section:

“Although the word (waiver) is flexible and not

always definite, it is capable of taking on a very definite meaning from its context. The doctrine of waiver is often difficult of application; and the question of whether a waiver is present in any particular case must be decided on the facts peculiar to that case."

In the case of *re Mauch Chunk Brewing Company*, 131 F. (2d) 48, denying the Bank's claim of set-off under the facts of that particular case, the Court said:

"Section 68 of the Bankruptcy Act allows a creditor to set-off, if certain conditions of that section are met, mutual debts existing between him and the debtor. This is a privilege which the creditor may or may not claim. If it is not asserted, it is lost. Likewise, if the creditor's conduct is inconsistent with a subsequent claim of set-off, he is held to have waived it."

While in the *Loble* case there was no technical trust fund but only a general account as in the case at bar, and there was no evidence of all the requirements of technical equitable estoppel as set forth in Appellant's brief, the Court said:

"While the monies realized on the special sale and deposited to the bankrupt's current account and subject to its checks for general purposes may not be said to come within the accepted definition of a special deposit so as to be exempt from the bank's claim to the right of set-off, we are inclined to the view that the circumstances under which the fund was created, and the cooperation of the bank and the bankrupt in its creation, were sufficient to so far impress upon it the character of a trust fund that the bank should be held estopped to assert a lien thereon or the right of set-off."

When the Bankrupt first made its proposal to the Bank, and later to its other creditors, the note of the

Bank was past due. The Bank lays considerable stress upon the fact that at that time it could have exercised a right of set-off against the account of the Bankrupt then on deposit with it. This, while true, would seem to be wholly immaterial. The exact amount in the bank account of the Bankrupt at the time that the proposition for settlement of its obligations was first presented to the Bank, or at the time that the Bank signified its agreement "to go along with the Bankrupt on the plan", is not determinable from the record. The Bank's Exhibit 5 shows that in the month of November, 1952, during which month the Bankrupt took the matter up with the Bank, and requested its acquiescence in the plan, the highest amount in the bank account of the Bankrupt was \$13,285.75, and the lowest amount was \$7,621.16. When the proposition was presented to it, the Bank was confronted with the necessity of making a decision whether or not to agree to the plan, and whether or not to exercise its existing legal rights. The Bank at that time, no doubt, weighed the fact that it had a right of off-set, the exercise of which would still leave a very substantial amount of its indebtedness, and perhaps the bulk thereof, owing to it. The Bank elected not to exercise its right of set-off against the existing account and to go along with the plan, and so advised the Bankrupt.

The Bankrupt then advised its other creditors of the terms of the plan and that the Bank, as its largest creditor, had agreed to participate therein. These other creditors were then confronted with the necessity for the making of a decision, the same as the bank had been. The decision to be made was, as in the case of the bank,

whether or not to immediately exercise legal right or permit the Bankrupt to carry out, or attempt to carry out the terms of its proposal. All of the creditors did acquiesce in the plan. It is a fair inference to make that in so doing they were influenced by the information given to them that the Bank, as the largest creditor, had acquiesced in the plan.

The plan referred to provided for the conversion of tangible assets of the Bankrupt, its stock of goods, wares and merchandise, to cash, to provide funds out of which the indebtedness owing to creditors could be paid over a period of ten months by ten equal monthly payments, commencing with payment of January 15, 1953. The Bankrupt proceeded to act under this plan and made the agreed monthly payments to its creditors, including the Bank, during the months of January, February, March, April and May, 1953, the Bank receiving during this time \$11,000.00, or 50% of its indebtedness, together with interest thereon. This may have been substantially more than the Bank could have realized by exercise of its right of off-set in November, 1952, at the time that the Bankrupt first informed the Bank that it could not continue in business and satisfy its obligations in the regular course, but would have to have an agreement with its creditors for allowance of time to convert the tangible assets into cash. In March, 1952, the Bank account of the Bankrupt, as shown by Exhibit 5, reached a low point of \$481.05 over-draft, by which time all monies originally subject to the Bank's right of off-set in November, 1952, had long since been exhausted. Sub-

sequent deposits were made by the Bankrupt from the proceeds of the continued operation of its business under the plan of extension, and were drawn upon to pay operating expenses and pro-rata payments to creditors in accordance with the terms of the plan of extension, until such time as the bankruptcy petition was filed herein.

It is submitted that under these facts: "The circumstances under which the fund was created, and the co-operation of the Bank and the Bankrupt in its creation were sufficient to so far impress upon it the character of a trust fund that the Bank should be held estopped to assert a lien thereon, or the right of set-off."

The above quotation is from the case of Union Bank and Trust Company v. Loble, decided by this Court upon facts similar to those in the case at bar. The facts of that case and the attempt of the Bank to distinguish that case from the case at bar will hereinafter be discussed.

In the case of Wagner v. Citizen's Bank & Trust Co. (122 Tenn. 164, 122 S.W. 245), cited by this Court in the Loble case, the trustee in bankruptcy had filed a suit to recover from the Bank the balance in the Bankrupt's bank account, which the Bank endeavored to off-set. The complaint alleged that the fund was impressed with the character of a trust fund and was accumulated under circumstances which fixed upon the defendant Bank the character of a trustee in relation to the fund. It was alleged that the money was accumulated as a result of an agreement among the creditors of the Bankrupt, including defendant Bank, to the effect that the assets of the

Bankrupt should be collected and the proceeds deposited in the defendant Bank and distributed pro-rata among all the creditors. It was claimed that under the facts set forth the Bank was "estopped from appropriating said funds to its own use, to the exclusion of other creditors."

The Court's statement of the facts discloses a familiar pattern arising when a debtor becomes unable to take care of his obligations. The creditors held a meeting, inquired into the financial condition of the company, and extended time to it to take care of its obligations. When the company became still further embarrassed, the creditors decided that the assets of the company should be reduced to cash, which should be deposited in the company's bank account, and only such sum thereof used as might be necessary to defray current expenses and satisfy the claims of persistent creditors, and the surplus, after the accumulation of sufficient funds, should be divided pro-rata among all the creditors. The Bank participated with the other creditors in these proceedings. The Court stated:

"We find from the proof that the fund which the bank is now seeking to set-off against the indebtedness due it from the furniture company was accumulated as the result of the auction sales, and that it was understood by the defendant bank that this fund was deposited with it as a special fund for pro-rata distribution among all the creditors of the Wilcox Furniture Company."

The Bank contended for its right to appropriate the balance in the bank account to satisfaction of the indebtedness due it from the debtor. The Court, after recogniz-

ing the Bank's right to set-off in the ordinary case, proceeded to the examination of several authorities setting forth special circumstances under which the alleged right had been disallowed, and concluded its opinion by stating:

"We are, therefore, of opinion that the Bank is estopped, by its conduct and by its agreement with the other creditors, from asserting any right to a set-off against the funds derived from the sales of the stock of the furniture company."

Among the cases examined was that of *Lyman v. Belfast National Bank* (98 Me. 448, 57 A. 799), also cited by the Court in the *Loble* case. In that case the debtor sent to each of its creditors, including the Bank, a circular letter stating that it was unable to meet its obligation. Later it called a meeting of its creditors, at which the Bank was represented. No extension of time was ever granted by the creditors. Pending the negotiations, the debtor deposited in its bank account at the Bank the sum of \$800 cash which it had on hand.

The Court said of the *Lyman* case:

"For some time past all the efforts of the granite company . . . and that of its creditors had been to obtain a distribution of its assets equitably, and to that end the first attempt was to discourage the attachments. Honest dealing on the part of the granite company, which is to be presumed, required that all of its assets should be husbanded for the benefit of all of its creditors. Pending the effort to obtain an assignment or adjudication of bankruptcy it had \$800 in money, which it intended to retain, and ought to retain, as part of its general assets. As some time would elapse before it could be thus administered, it was deposited in the bank really for

safekeeping. All these facts were well known to the bank when it received the deposit. It knew it was not intended as a payment and did not treat it as such. The bank could not fail to understand that it was intended that this money should be added to the other assets for the general benefit as it equitably ought to be. It certainly understood that the granite company, under the then existing circumstances, would not voluntarily subject this portion of its assets to a set-off by the bank to the injury of other creditors. Upon consideration of all the circumstances, and the situation of the parties, we think it a fair inference that the bank understood that the deposit was intended only for safekeeping, to be ultimately appropriated for the benefit of all the creditors of the granite company, and that in fact it was a deposit in trust for that purpose. And it being charged with such trust, the plaintiff, as trustee in bankruptcy, is entitled to recover."

The case of *In re Davis* (119 F. 950) also cited by the Court in the *Loble* case, was cited by the Court in the *Tennessee* case, with the following quotation therefrom:

"But upon the merits of the controversy, would the bank be in a position to successfully contest the right of the trustee to the money? Its ability to do so would depend upon its right to apply the fund to its own use. While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose—as, for example, to be paid to creditors, as was the case here."

In the case of the *Twentieth Street Bank v. Gilmore* (1934 CCA W.Va.), 71 F. (2d) 594, the Court, after stating the general rule that a Bank may set-off a de-

posit made in the ordinary course of business and subject to withdrawal by the depositor, even though the Bank may know that the depositor is insolvent at the time, the Court went on to cite many cases where, under the facts of the particular case, the right of set-off was denied to the Bank. Among the cases cited was the Loble case, where the holding was stated to be that "the circumstances under which the funds deposited were raised and the co-operation of the Bank with the depositor so far impressed them with a trust as to estop the Bank from asserting its right of set-off."

The following is quoted from the opinion of the Court to the case last referred to of Twentieth Street Bank v. Gilmore:

"But, in order that the bank may invoke this rule, the deposit must have been made by the depositor, in the ordinary course of business. The right of set-off does not exist if the bank accepts the deposit knowing that it is made for a special purpose or is subject to a trust for the creditors of the depositor. Thus the right of set-off was denied in *Merrimack Nat. Bank v. Bailey* (CCA 1st) 289 F. 468, 5 ABR (NS) 663; *id.* (DC) 283 F. 514, 49 ABR 232, where the deposits were made in the regular course of business by the corporation, but after a creditors' committee, on which the bank was represented, had taken over the business following an agreement of creditors for an extension of credit. Such right was likewise denied in *Union Bank & T. Co. v. Loble* (CCA 9th) 20 F. (2d) 124, 10 ABR (NS) 350; *Union Bank & T. Co.'s. Petition* (DC) 14 F. (2d) 116.8 ABR (NS) 571, where the deposits were the proceeds of a sale to raise funds for Eastern creditors, and it was held that the circumstances under which the funds deposited were raised and the co-operation of the bank with the depositor so far im-

pressed them with a trust as to estop the bank from asserting its right of set-off. A like result was reached by Judge Groner in *Gates v. First Nat. Bank* (DC) 1 F. (2d) 820, 2 ABR (NS) 507, where the deposits were made after the depositor had suspended business and its affairs were being investigated by a creditors' committee of which the Vice President of the bank was a member. And this court in *Union Trust Co. v. Peck* (CCA 4th) 1 F. (2d) 986, 987, 9 ABR (NS) 127, denied the right of set-off where the deposits were made while creditors were conferring as to the adoption of a plan of reorganization. See also *First Nat. Bank v. Sheely* (CCA 5th) 29 F. (2d) 400, 13 ABR (NS) 72; in *Re Davis* (DC) 119 F. 950, 9 ABR 670; and *Wagner v. Citizens' Bank & T. Co.* 122 Tenn. 164, 122 S.W. 245, 28 LRA (NS) 484, 135 Am. St. Rep. 869, 19 Ann. Cas. 483.

'In the case at bar, the committee of creditors, of which the president of the bank was a member, had decided that no payments were to be made from the proceeds of its operation of the business on the larger debts of the milling company, which included the indebtedness due the bank, but that collections were to be used for the purpose of running the business and for the benefit of creditors generally. Later, when bankruptcy seemed inevitable, the committee directed that nothing be paid on indebtedness, but that collections be pressed and the money realized therefrom be deposited so that the Court, and not the committee, might decide as to its application. Under such circumstances, the deposits made were clearly not deposits in the ordinary course of business by the milling company, and certainly the bank, after acquiescing in the plan of the committee, was estopped from claiming that it had the right to seize deposits made with it in the carrying out of this plan and apply them on debts of the bankrupt owing to itself. As said by Judge Rose in *Union Trust Co. v. Peck*, *supra*: 'Most men would feel

that it is an implied term on such negotiations that during their pendency nobody taking part in them shall do anything to secure preferential rights in or over any assets of the bankrupt which did not belong to it when the conferences began, or upon which it did not then have a prior lien.' ”

Proposition III.

Upon principle, the case at bar is not distinguishable from the case of *Union Bank and Trust Company of Helena, Montana v. Loble* (9th Cir.) 1927, 20 F. (2d) 124, in which the right of set-off was denied to the Bank.

Union Bank and Trust Company of Helena, Montana v. Lester H. Loble, Trustee, 20 F. (2d) 1924 (9th Cir. 1927).

As its proposition IV, the Appellant Bank contends that the case of *Union Bank and Trust Company of Helena, Montana v. Loble*, 9th Cir. 1927, 20 F. (2d) 124, does not constitute authority for denial of the Bank's alleged right of set-off in this case, and endeavors to distinguish the facts of the Loble case from the facts in the case at bar.

It is, of course, too much to expect that the exact factual situation should exist in each case. It is submitted, however, that the factual differences that do exist are wholly immaterial, and that the facts of each case require the application of the same principles and the same result in the decision of the case.

Appellant speaks of the facts of the Loble case as found by the District Court (App's. Br. 25-27) and states p. 27) that this Court accepted the facts as found

by the Referee and affirmed by the District Court. There were no findings of fact made by the Referee or District Court upon the matters which this Court found controlling in arriving at its decision.

As stated in the opinion written by this Court, at page 125:

“All that the Referee found was that the bankrupt ‘was insolvent at the time of such transfer and deposit, and that the bank knew, or had reasonable cause to know, that the effect of taking said money and paying said debt to itself would be that it would receive a greater percentage of the assets of said bankrupt than any other creditor of the same class, and that said bank knew, or had reasonable cause to know, that said bankrupt was insolvent at the time said transfer was made and prior thereto.’ ”

This Court held that the conclusion of the Referee and of the Lower Court could not be sustained on the grounds given in the opinion of the Lower Court, and proceeded to examine the facts of the case as disclosed by the testimony. Accordingly, the facts are stated somewhat differently in the opinion of this Court than in the opinion of the Lower Court; and as the facts stated in the opinion of this Court are based upon an examination of the testimony and not upon any findings of fact of the Lower Court, it is to be assumed that the opinion of this Court correctly states the facts of this particular case, as well as the law applicable thereto.

In the conclusion of its argument (App’s. Br. 42) Appellant states that in the case at bar it was the District Court’s feeling, as evidenced by its memorandum of decision that inasmuch as the Referee regarded this

case as being controlled by the Loble case, it would not be inappropriate for this Court which decided the Loble case, to point out wherein the two cases may be distinguished. We know of no such feeling on the part of the Court, and certainly no such feeling is evidenced by the memorandum of decision. In this memorandum (Tr. 27) the Court did state that: "I do not feel that I should strain to distinguish the Loble case, and I will follow the view the Referee took of it."

Appellant has so strained in its Proposition IV to distinguish the two cases. Most of the factual differences pointed out, seem to us to be wholly immaterial. Some of them, in our interpretation of the facts as stated in the opinion of this Court, do not exist. We will follow Appellant's outline, by which attempt was made to distinguish the two cases.

Loble Case

1. At the time of the agreement the Bankrupt owed the Bank \$10,000 on a 90-day renewal note. It is not stated whether the note was in default.

This Case

1. At the time the extension was granted the Bankrupt owed the Bank \$20,000 on a note which was in default.

It, of course, can make no difference whether the indebtedness owing the Bank is \$10,000 or \$20,000 (actually \$22,000 in this case), or any other figure. Nor can it make any difference whether or not the note was in default at the time of the agreement for extension of time. No statement is made in the opinion of either the Lower or Appellate Court as to this fact; but, in view of the statement of the Lower Court that the Bankrupt

was at the time, "without funds, insolvent, pressed by creditors, suspension of business imminent, and in extremis", it is the more logical assumption that the note was in default.

2. The Bankrupt not only had no balance in its account, it was indebted to the Bank on an overdraft in excess of \$1000.

2. The Bankrupt had a balance in its account ranging from \$8165.79 to \$22,301.09 during December, 1952. The exact date of the discussion between the representatives of the Bankrupt and the Bank is not in the record.

What difference can it make in the application of the principles involved, that the bank account was in one case greater than in the other at the time the agreement was entered into. Evidently the point that Appellant Bank wishes to make, is that it was in a position to exercise a right of off-set at the time that it elected not to do so and entered into the extension agreement. It is clear from the record that during the month of December, 1952, the extension plan was already in operation. The Bankrupt had taken the matter up with the Bank in November, 1952 (Order Disallowing Claim, Tr. 18). In that month the high balance in the bank account of the Bankrupt was \$13,285.75 and the low balance \$7,621.16 (Claimant's Exhibit No. 5, Tr. 61). In the next month, after the extension plan was put in operation, the high balance increased to \$22,328.59, and increased again in the ensuing month to \$25,897.57. The amount which the Bank might have realized upon its indebtedness by exercising its right of off-set, had it elected to do so, is conjectural. However, it is also wholly immaterial. What

is material, is that the Bank elected not to exercise such right of off-set, and to go along with other creditors upon the extension plan proposed by the Bankrupt.

3. After a series of conferences initiated by the Bank, a plan formulated and presented by the Bank was adopted at the insistence of the Bank, resulting in an agreement between the Bankrupt, the Bank and creditor - relatives of the Bankrupt's management.

3. The Secretary-Treasurer of the Bankrupt and its attorney called on an officer of the Bank to advise him of the Bankrupt's financial condition. They suggested that if the excessive inventory were liquidated in the normal course of business, rather than as salvage stock, they thought the corporation would be able to continue its operation. They suggested that the Bankrupt make quarterly payments to its creditors of its outstanding obligation. The Bank stated that quarterly payments would not be acceptable but that if the Bankrupt made payment in liquidation of its obligation owing the Bank of 10% per month commencing in January, 1953, the Bank would defer any action on the obligation, but only for so long as the monthly payments were made.

Appellant Bank has repeatedly stressed, as an important factual difference, that in the Loble case the plan was formulated and presented by the Bank; while in the case at bar it was presented, in the first instance,

by the Bankrupt. It is submitted that this is an immaterial factual distinction. Certainly the rights of the parties in this case should not turn upon who originally proposed the plan which the parties adopted, and partially executed. In fact, in this case, the Bank did not like the plan originally presented to it, and suggested a modification, which was adopted.

4. The agreement between the Bankrupt, the Bank and the creditor-relatives was:

(a) To have an extraordinary sale;

(b) The proceeds of the sale to pay "urgent Eastern creditors" (14 F. 24 117). The purpose of the sale was to create a particular fund for a particular purpose.

(c) To deposit proceeds of the sale in the Bank.

4. There was no agreement in the sense the term was used in the Loble case. The Bank granted an extension of time to the Bankrupt within which to liquidate the obligation, expressly conditioned on the prompt payment by the Bankrupt of 10% of the obligation each month commencing January 15, 1953. The extension agreement did not earmark the deposit for any particular purpose.

There was just as much of an agreement in the one case as in the other. The Bankrupt agreed to liquidate its stock in a certain manner, and to treat all creditors alike, by making a payment to each of them monthly of 10% their respective accounts. The Bank agreed to "go along with the Bankrupt on the plan and refrain from pressing for immediate payment in full of the indebtedness due it, providing that the monthly payments of 10% were made." (Tr. 18, 19). The purpose of the agreement in this case was certainly just as in the Loble case, to create a particular fund for a particular purpose.

In this case the purpose of the creation of the fund was clearly expressed, that is, to pay all creditors alike, 10% of the amount of their respective accounts monthly. The bank account was just as much earmarked for a particular purpose in the one case as in the other. In neither case was a special account created. In both cases the proceeds of the sale were deposited in the regular pre-existing general bank account of the Bankrupt, and were subject to withdrawal upon the checks of the Bankrupt alone.

5. At the date of the exercise of the right of set-off, the Bankrupt's account had increased from approximately a \$1,000 deficit to an \$8,378.56 credit.

5. At the date of the exercise of the set-off, the Bankrupt's account had decreased from a sum between \$8,000 and \$22,000 to \$2,889.14.

As stated under number 2 above, the bank account actually decreased from the time the extension plan was entered into to the date of bankruptcy, from between \$7,621.16 and 13,285.75 to \$2889.14. As we have before stated, however, the exact amounts are in our view immaterial. The Bank did not exercise any right of off-set against the bank account as it existed in November and December, 1952, but did endeavor to exercise such a right of off-set against the account as it existed several months after the plan of extension had been put into effect, and the Bank had enjoyed the fruits of the plan by receiving payment thereunder of the sum of \$11,000, together with interest.

6. A fund was created by the operation of the agreement.

6. An existing fund was depleted during the liquidation program adopted by the Bankrupt.

Appellant Bank can only mean that the Bankrupt had more money in its bank account when the extension agreement went into effect than it did at the time of bankruptcy. A fund was, of course, created by the operations under the plan of extension. This fund was paid out to creditors of the Bankrupt, resulting in payment to each of them 50% of his account, including payment of \$11,000, plus interest, to the Bank. This amount may, or may not, have been more than the Bank could have realized had it elected to exercise its right of off-set in November, 1952. In March 1953, the bank account of the Bankrupt, as shown by Exhibit 5, reached a low point of \$481.05 overdraft, by which time all monies originally subject to the Bank's right of off-set in November, 1952, had long since been exhausted. Subsequent deposits were made by the Bankrupt from the proceeds of the continued operation of its business under the plan of extension.

7. The Bank refused to allow the funds to be used to pay Eastern creditors, as contemplated by the agreement (14 F. 117) apparently because the Bankrupt had presented an alternative plan to it involving the payment of 25% to each creditor. (20 F. 2d 125). The Bank breached the agreement by diverting the funds in the account (which had been created for a special purpose) to its own use, contrary to the agreement.

7. The Bankrupt failed to comply with the condition on which the extension of time was granted by not making the June payment, and by filing its voluntary petition in bankruptcy.

The Bank in the Loble case made no more of a diversion of the funds in the bank account than did the Bank in the case at bar. In both cases the Bank endeavored to exercise a right of off-set in its own favor when the plan of operation, under which the bank account was created, was not carried out by the Bankrupt. This Court in its opinion in the Loble case stated: "While the money was in its possession on deposit, the Bank placed no obstacle in the way of its disbursement to Eastern creditors until early in January, when it became apparent that the suggested plan of reorganization had failed. Thereafter the Bankrupt presented to the Bank a proposition to compromise with all creditors on the basis of twenty-five cents on the dollar. The Bank denied the Bankrupt's right thus to use the money on deposit, and asserted its own claim of lien thereon."

Likewise in the case at bar, the Bank placed no obstacle in the way of disbursement of the funds contained in the bank account until after the plan of extension had failed in that the Bankrupt was no longer able to perform under it.

8. The Bank asserted the setoff before the petition in bankruptcy was filed.

8. The Bank exercised the set-off after the petition in bankruptcy was filed.

We can imagine no basis whatsoever for treating the two cases differently on this account. The right of set-off, if it exists at all, is not dependent upon a petition in bankruptcy having been filed.

9. The account was created for a specific purpose

9. The account was created some six years prior

and the Bankrupt was expressly limited by the agreement between the parties from making any withdrawals from it except as authorized by the agreement.

to the financial difficulty of the Bankrupt and continued until the right of set-off was exercised. As specifically found by the Referee, there was no change of any kind in the account or the manner in which or the terms upon which it was operated or maintained. The extension agreement did not provide that the future deposits should be used for any specific purpose.

There is no basis whatsoever for the statement that the Bank account in the Loble case was created (if by this is meant newly established or opened) as a part of the agreement that was entered into. The bank account was a general pre-existing bank account in both cases. As stated by the Court in its opinion: "The special sale was had, and during the months of December and January the Bankrupt deposited the proceeds thereof to its account in the bank, *subject to check in the same manner as money it had previously deposited.*" Nor is there any basis for the statement that the Bankrupt in the Loble case was expressly limited by the agreement between the parties from making any withdrawals from it, except as authorized by the agreement. As stated by the opinion of this Court: "The Bank never refused to honor any checks drawn by the Bankrupt, and during December and January it paid out thereon, as the Court below found, about \$4,708, or about one-third of the money realized upon the sale, none of it to pay Eastern cred-

itors, but principally to pay relatives, local creditors and current expenses.”

Appellant proceeds to cite and discuss various cases in which reference was made to the Loble case. None of these cases criticize the holding of the Loble case. In the case of *Ingram v. Bank of Cottage Grove*, the bank participated in no plan of extension. In fact there was none. This again was simply a case where the depositor became financially involved to the knowledge of the bank, and the Court held that this alone did not affect the bank’s right of set-off. It is a far different situation in the case at bar where the bank participated in the plan of extension and accepted its benefits over a period of several months.

The same may be said of the cases of *Killoren v. First National Bank of St. Louis*, *Citizens National Bank of Gastonia v. Lineberger*, and *Twentieth Street Bank v. Gilmore*. They are cases sustaining the bank’s right of set-off under the facts of those cases which presented no situation remotely similar to that in the Loble case and in the case at bar. All of these decisions impliedly approved the holding of the Loble case as applicable to the facts of that case.

In the Killoren case in which the Loble case was discussed and held inapplicable as authority in the case then before the Court, the Court pointed out that in the Killoren case the Bank had made no agreement whatsoever with the depositor, stating at page 540 of the opinion:

"It requires no fine analysis or sifting of the evidence to demonstrate that the Court was correct in finding that while there was some conversation between the representatives of Commercial Factors Corporation and officers of the bank with reference to the question whether the Shoe Company would be able to meet its payrolls on April 15, the Shoe Company made no agreement whatever with the bank relative to the deposit, indicating that it should be applied or allocated to any special purpose."

CONCLUSION

We are at a loss to understand why counsel for Appellant in the conclusion of their brief ascribe to us the "preposterous" argument that they there do. We have at no time in the course of this litigation contended, as stated by counsel, that an extension of time within which to pay a delinquent obligation operates as an absolute waiver of the right to proceed to the collection of the obligation, "even though the extension is conditioned upon periodic payment on the delinquent obligation."

The uncontroverted finding of the Referee was that the Bank agreed to go along with the plan and refrain from pressing for immediate payment in full of the indebtedness due, providing that the monthly payments of 10% were made. The same condition attached to the obligation of every other creditor participating in the plan. At any time that the condition of monthly payment was not met each creditor could if he saw fit press for immediate payment, but this does not mean that the Bank could then appropriate the bank account that had been accumulated under the operation of the plan toward

payment of its own obligation to the exclusion of the other creditors.

In reading the short transcript of testimony and considering it as a whole, one can hardly escape the conclusion that the Bank not only entered into the plan of liquidation and payment but dictated some of its terms. It participated in the plan with full knowledge that other creditors likewise were participating and that each and all were relying upon the good faith of the debtor and of the creditors to carry out the plan. All creditors were treated alike, except that the Bank received accruing interest in addition to the 10% monthly payments on the principle. All creditors received the benefit of the orderly liquidation. The debtor in good faith reduced its staff to minimize the expense of liquidation. The bank account was used for the purpose of paying the expenses of administration and distributing the funds proportionately to the creditors. For several months prior to bankruptcy the bank account was used for no other purpose than to pay the expenses of liquidation and to distribute the funds proportionately to the creditors.

In any plan designed to enable a financially distressed person or business to work out of its distressed condition with the cooperation of its creditors, the cooperation of merchandise and service creditors, is just as necessary as is that of a bank creditor. The creditors were all advised that the inventory of the Bankrupt would be disposed of and the net proceeds of the sale distributed to creditors, including the Bank, on a pro-

rata basis. If the letter to the creditors, requesting their participation in the plan, had stated something to the effect that the proceeds of the sale of the inventory would be deposited in the Bank and that the Bank reserved the right at any time to seize such proceeds and apply them in payment of its indebtedness in preference to that of other creditors, the degree of cooperation obtainable from these other creditors can well be imagined.

We submit that the conclusion of this Court in the Loble case is sound. It is based on consideration of equity and upon adequate authority. It has not upset banking practice and has not precipitated bankruptcies. We submit further that the facts of the case at bar require the same conclusion reached in the Loble case that, "the circumstances under which the fund was created, and the cooperation of the Bank and the Bankrupt in its creation, were sufficient to so far impress upon it the character of a trust fund that the Bank should be estopped to assert a lien thereon or the right of set-off."

We submit that the attack of the Bank upon the conclusions and order of the Referee and upon their affirmance by the District Court, is not merited, and that the order of the Lower Court should be affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

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vs.

FRANK A. DUDLEY, Trustee in Bankruptcy of the
Estate of Northwest Variety Wholesale, Inc.,
Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court for the
District of Oregon.*

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*Appeal from the United States District Court for the
District of Oregon.*

This Reply Brief is submitted to answer certain of the contentions and arguments and clarify some of the statements contained in the Brief of Appellee. For convenient reference, the arguments of appellee will be considered in the order of their presentation in his brief.

Before discussing the details of appellee's brief, we wish to emphasize its significant failure to show that the Loble case, upon which virtually his sole reliance is placed, is in point. It was based on a state of facts in

which the banker asserting set-off was a party to an agreement with the bankrupt and certain of the bankrupt's creditors which provided for the making of deposits in an existing account, derived from the sale of specific property, and for the use of these deposits exclusively for a group of creditors other than the banker. There was, in essence, a special deposit or series of deposits earmarked for a special purpose, and the attempted set-off violated the express conditions agreed to by the bank. Here, to the contrary, there is no pretense of any agreement for the making of deposits in the account or for the use or application of the deposits. In other words, there was no arrangement for a special deposit.

We said in our opening brief, and here repeat, that the right of set-off exists, under the cases, unless there is a relationship involving a type of special deposit, trust fund, estoppel or waiver. Since the Loble case involved what was really a special deposit, it is wide of the mark.

APPELLEE'S PROPOSITION I

Appellee admits the general rule that a creditor has the right to set off a debt owing by it to the Bankrupt against a debt owing by the Bankrupt to it and that, if the parties do not effect the set-off prior to bankruptcy, it is the duty of the Trustee to do so after bankruptcy. But Appellee asserts that this rule is subject to the modification that it is permissive, rather than mandatory, and should be construed so as to promote equality and justice in accordance with principles of equity.

In support of his contention that set-off is an equitable matter Appellee cites three cases. The first is the case of *Union Bank and Trust Company of Helena, Montana v. Loble* (9th Cir.) 1927, 20 F. 2d 124. It will be discussed at a later portion of this brief. The second is the case of *Cumberland Glass Manufacturing Company v. Charles DeWitt*, 237 U.S. 447, 59 Law Ed 1042, quoted on page 7 of Appellant's brief, and was an action by DeWitt against the Glass Company for damages allegedly resulting from a conspiracy in which the Glass Company participated. Judgment was rendered in favor of DeWitt and the Glass Company appealed. The only defense before the Supreme Court for consideration was one of *res judicata*. The language of the court quoted in Appellee's brief is appropriate in its setting, but it cannot be removed from it and certainly has no application to the facts before this Court in the present case.

The case of *Prudential Insurance Company of America v. Nelson* (CCA 6th Circuit), 101 F. 2d 441, cited on page 8 of Appellee's brief, concerned a question of whether or not a right of set-off existed at all. The court held that, under the peculiar circumstances of the case, the credit which the insurance company was attempting to set off had not arisen until after the filing of the petition in bankruptcy. Therefore, since there were no mutual debts and credits existing at the time of the filing of the petition, there was no set-off available.

We submit that neither of these cases supports the proposition for which it was cited. The cases referred to in Proposition I of Appellant's brief are square in their

holding that Section 68a of the Bankruptcy Act is a codification of the common law right of set-off and that it is a right to which the creditor is basically entitled, unless he be shown to have in some way renounced it. It is not, as it seems to us the Appellee contends, a right to which the creditor must show he is entitled. The burden is on him who opposes the exercise of the right to show why it should be denied, not on him who would exercise it to show why he should be allowed it.

On pages 9 and 10 of his brief, Appellee first falls into the error of regarding the Loble case and this case as being not distinguishable. Appellee states that:

“All that is held in the case at bar, as in the Loble case heretobefore decided by this Court, is that a bank will be precluded from asserting a set-off where it enters into an arrangement with the depositor and his other creditors involving an extension of time to the depositor to pay his debts, and use of the assets of the depositor for the making of payments to creditors, including the bank, on a pro-rata basis.”

We submit that this statement is incorrect. In this case there was no agreement or arrangement of any kind, express or implied, that the assets of the bankrupt depositor should be used for making payments to creditors on a pro rata basis. Indeed, there is no evidence or finding that there was any communication at all between the Bank and other creditors or that the Bank had anything whatsoever to do with the extension of time which was obtained from other creditors, or any supervision or control of any kind over the Bankrupt's operation.

If a right of set-off is denied in this instance it must be upon the basis that by granting an extension of time for the purpose of enabling the debtor to attempt to work out of its financial difficulty, the Bank is thereafter forever prohibited or estopped from asserting the right. This is not and should not be the law.

During the course of his brief the Appellee makes continued reference to a "Plan" or "Proposition" without ever defining his terms, but creating the inference that a formal detailed proposal involving liquidation of inventory and, perhaps, dissolution, was presented to and accepted by the Bank. Such is not the fact.

The Bankrupt did advise the Bank that it had a heavy inventory that could be disposed of to best advantage over a full year of normal business operation. But the Bankrupt never did present a "plan of liquidation" to the Bank, nor did the Bank ever inject itself into the Bankrupt's operations nor did it receive or request any report or statement from the Bankrupt. At the Bankrupt's request, the Bank agreed that it would not pursue the immediate collection of the defaulted obligation provided, and only provided, the Bankrupt made payments of not less than ten per cent per month on that obligation. That was the whole agreement, and the manner in which that sum was to be raised by the Bankrupt and whether or not any other creditor was a party to a similar agreement was no concern of the Bank. (Transcript of Record, p. 18, par. 4 and 5.)

Appellee has stated several places in his brief that there is no evidence in the record as to the balance in

the Bankrupt's account at the time that the Bankrupt presented its proposal to Appellant Bank. Appellant's Exhibits 5 and 6 include a complete statement of the running balances in the Bankrupt's account for the period from November 20, 1952, until the account was closed in July of 1953, and a complete record of the high and low monthly balances in the account for the period from January 5, 1951, through June, 1953. The conference which resulted in the proposal made by the Bankrupt occurred some time in early December of 1952 (Transcript of Record, p. 41, 66). The high and low balances in the Bankrupt's account during the month of December, 1952, are consequently quite relevant in showing the amount which was available for offset by Appellant when the request for extension was originally made.

It is obvious from an examination of the above mentioned exhibit that if Appellant had offset the substantially larger deposit that was in the account of the Bankrupt at the time of the original request for an extension of time and had participated with other creditors in the net proceeds derived from the sale of the remaining assets of the Bankrupt, it would have netted a very substantial sum in excess of that which it has obtained by deferring the exercise of its right until after bankruptcy, at which time there was a much smaller amount in the account against which the debt of the Bankrupt could be charged.

APPELLEE'S PROPOSITION II

This Proposition is an elaboration of the thesis advanced in the first Proposition that "the primary question . . . is whether, under the facts of the particular case, it was equitable and in the furtherance of the principles of equity and justice that the set-off should be allowed". Appellee appears to admit the elements of estoppel or waiver are not present, but contends that, "in the furtherance of principles of equity and justice", the Bank should be denied its right of set-off.

In support of his contention, Appellee quotes from American Jurisprudence, Section 35, on the subject of Estoppel, which distinguishes between equitable estoppel and technical estoppel, but Appellee does not then explain in what manner or on what theory either principle is applicable to the facts before this Court.

And Appellee then quotes from 31 C.J.S., Section 61, which defines waiver as "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right". But again, where is the evidence that this known right of set-off was intentionally relinquished at any time or where is the conduct that warrants the inference of any relinquishment or intention to relinquish such right? The record will show that the testimony is exactly to the contrary—unless this Court is to hold that the mere fact that Appellant voluntarily extended the time of payment of a matured obligation and, in order to give the Bankrupt an opportunity to work out its difficulties, did not exercise its right of set-off to a much larger sum of

money than was available at the time of bankruptcy, constitutes such an inference.

On page 15 of his brief Appellee states that "the Bank elected not to exercise its right of set-off against the existing account and to go along with the Plan, and so advised the Bankrupt". Again we state that there never was any such election unless this Court is to hold that the granting of the extension of time without exercising the right of set-off which was then available constitutes an election. And if it does, then it necessarily follows that that any creditor having the right of set-off available to him is precluded from cooperating with a debtor, or even granting an extension of time, without at the same time, intentionally or unintentionally, waiving a valuable right. Such a construction of the statute was never intended and cannot possibly be justified.

Appellee made the following statement at page 12 of his brief:

"As will be seen, the Courts in disallowing the right of set-off in certain cases, have not been concerned primarily with whether or not a waiver or an estoppel or a trust fund in the technical sense existed in the particular case. To be sure, in some cases estoppel or waiver or a trust fund in the strictly technical sense has existed. The primary question however, has always been; whether, under the facts of the particular case, it was equitable and in furtherance of the principles of equity and justice that the set-off should be allowed."

Appellee has cited cases in support of his statement that the courts have not been concerned whether waiver, estoppel or trust fund "in the technical sense" was present. We suggest they do not support that proposition.

In re Mauch Chunk Brewing Company, 131 F. 2d 48, cited at page 14 of Appellee's brief, concerned an actual waiver. The bank, at the request of the trustee, turned over to the trustee the balance in the account of the brewing company. The trustee opened an account in his own name and deposited in it the funds withdrawn and also other funds. The bank then sought to set off the balance in the trustee's account against an indebtedness owing to it by the brewing company. The court held that the bank, having surrendered the account and thus extinguishing the claim of the brewing company against it, could not revive the claim and assert it against the trustee or offset it against the funds in the trustee's account. This, of course, is very different from what happened in the instant case.

In the case of *Wagner v. Citizen's Bank & Trust Co.*, 122 Tenn. 164, 122 S.W. 245, cited and discussed at pages 17, 18 and 19 of Appellee's brief, the court stated that ". . . it was understood by the defendant bank that this fund was deposited with it as a special fund for pro rata distribution among all the creditors of the Wilcox Furniture Company". (Emphasis added) It will be noted that the denial of that bank's right of set-off is based upon the acknowledged purpose of the deposit as a "special fund" and that bank's "agreement with other creditors" concerning the manner in which and the purpose for which the funds would be used.

Lyman v. Belfast National Bank (98 Me. 448, 57 At. 799), discussed in Appellee's brief at page 19, involved a situation where the sum which the bank attempted to set off had been deposited with it for safekeeping, and

the bank knew that that was the purpose of the deposit. The court rightly held that the bank could not accept the deposit for safekeeping and then repudiate that agreement by exercising the right of set-off. This is a clear case of estoppel, and the elements of representation, reliance and prejudice are all present. None of these elements is present in the case before this Court.

In another case cited at page 20 of Appellee's brief, *In re Davis*, 119 F. 950, the bankrupt deposited the proceeds of the sale of certain goods with the bank, *taking a receipt which recited on its face* that the money was to be paid to the creditors of the bankrupt, pro rata, as their interests might appear. The court held that the bank could not set off its obligation owing the bankrupt against that sum, inasmuch as to do so would be to permit the bank to act in violation of the express agreement pursuant to which the funds were deposited with it. Again, this is a clear case of an estoppel, and each of the requisite elements is present.

In the case of *Twentieth Street Bank v. Gilmore*, 71 F. 2d 594, cited at pages 20 and 21 of Appellee's brief, the deposit was made by a creditors' committee for the express purpose of accumulating a fund for the creditors. The president of the plaintiff bank was a member of the committee and knew of and participated in the formulation of the policies pursuant to which the committee was operating the bankrupt. The court held that these were not deposits in the ordinary course of business and that the bank, through its president, knew they were not. The court referred to the Loble case as one ". . . where the

deposits were the proceeds of a sale to raise funds for Eastern creditors, and it was held that the circumstances under which the funds deposited were raised and the co-operation of the bank with the depositor so far impressed them with a trust as to estop the bank from asserting its right of set-off". (71 F. 2d 597)

These are the only cases cited by Appellee in support of the proposition that, although none of the "technical" elements of estoppel, waiver, trust fund or special deposit are present, the bank should, nevertheless, be denied its right of set-off. In each of these cases, however, the "technical elements" of either waiver, estoppel, trust fund or special deposit were present. In none of these cases is the factual situation described analagous in any way to that presented in this case. In this case there is admittedly no agreement between the creditors; rather there is a conditional extension granted by the Bank to the Bankrupt. Further, the account was in all respects and at all times a general commerical account, and was in no wise or at any time a special account, nor did it have any of the characteristics of a special account, nor was there any restriction of any kind upon the right of the Bankrupt to check on it or any understanding of any kind, express or implied, that the account should be used for any particular purpose or limited in any way whatsoever.

APPELLEE'S PROPOSITION III

Appellee has devoted this Proposition to a discussion of the case of *Union Bank and Trust Company of Helena, Montana v. Lester H. Loble, Trustee*, 20 F. (2d) 124. Although this case was the subject of Proposition IV of Appellant' opening brief, we feel that Appellee has made some erroneous statements and drawn some erroneous conclusions that require comment.

On page 25 of his brief, Appellee contests a statement made in Appellant's opening brief to the effect that we did not feel the Honorable District Judge regarded the *Loble* case as requiring the denial of the right of set-off in this case. Appellee quotes a statement made by the Honorable District Judge in his Memorandum of Decision that "I do not feel that I should strain to distinguish the *Loble* case, and I will follow the view the Referee took of it." The whole Memorandum Decision is included in the Transcript of Record at page 27. However, in order that the statement quoted in Appellee's brief may be properly understood, we wish to here quote the paragraph preceding it. (Transcript of Record, p. 27)

"Because I am not impressed as an original proposition that such a loose arrangement, as presented here, should work a loss of the Bank's right of set-off, I have examined *Union Bank & Trust Co. vs. Loble*, 20 F. 2d 124, closely. The learned Referee thought it was controlling; counsel for petitioner strongly urges that the present case and that case are distinguishable."

This indicates to us that the trial court was by no means convinced either that the Bank should be pre-

cluded from it right of set-off or that the *Loble* case so held. It is our humble opinion that the Court could hardly have said more without reversing the Referee and that the only reason that the trial court did not do so was because it felt that, since this Court decided the *Loble* case, this Court should do the distinguishing. And we submit that it is properly distinguishable.

Beginning at page 25 of his brief, the Appellee discusses the factual comparison made by Appellant in its opening brief of the *Loble* case with the case before this Court. The explanation is advanced that each factual difference does not, or should not, make any difference in the outcome of the case. Appellee missed the point of the comparison. We did not and do not contend that each comparative item in itself is a decisive distinguishing characteristic. The purpose of the outline was to compare *each* of the facts in the *Loble* case, as disclosed by the opinions of the District Court and this Court, with each comparable fact in this case. The outline was not limited to the distinguishing facts. The point and purposes of the outline, and it is clearly shown, is that in no material particular are the facts of this case similar to the facts in the *Loble* case. Further, the particular facts regarded as decisive in the holding in the *Loble* case are directly opposed to comparable facts in this case.

In his discussion of comparative item No. 4 (at page 29 of Appellant's brief and page 28 of Appellee's brief) Appellee makes an erroneous statement of fact. The following statement is made:

"In this case the purpose of the creation of the fund was clearly expressed, that is, to pay all creditors

alike, 10% of the amount of their respective accounts monthly. The bank account was just as much earmarked for a particular purpose in the one case as in the other. In neither case was a special account created. In both cases the proceeds of the sale were deposited in the regular pre-existing general bank account of the bankrupt, and were subject to withdrawal upon the checks of the bankrupt alone." (Appellee's brief, page 29)

In this case the only evidence is, and the referee found, that the general commercial account maintained by the Bankrupt from 1946 was unchanged until it was closed the day after the petition in bankruptcy was filed. There was no fund and there was no special purpose. Insofar as the Bank was concerned there was no restriction of any kind on the Bankrupt's right to use the account for any purpose it saw fit, and it could have paid one creditor in full or drawn a check to some charity. Further, there was no "sale" as implied in the paragraph above quoted. The Bankrupt intended to and did continue to conduct its business in the usual way. (Transcript of Record, pp. 39, 40, 41)

In the *Loble* case, there was "an extraordinary sale of the bankrupt's stock" and it was agreed that "the proceeds of the sale would be deposited in the bank and devoted to the payment of urgent Eastern creditors . . ." (14 F. 2d 116) The sale was held and the proceeds deposited subject to this agreement.

Appellee's inference that a special sale was had and the proceeds "earmarked for a particular purpose" is in error. That was true in the *Loble* case, but it is not true here, and the factual difference is a very material one.

We also submit that the Appellee made another erroneous assertion at page 31 of his brief. On that page the following statement is made:

“The bank in the *Loble* case made no more of a diversion of the funds in the bank account than did the Bank in the case at bar. In both cases the Bank endeavored to exercise a right of setoff in its own favor when the plan of operation, under which the bank account was created, was not carried out by the Bankrupt.”

In the *Loble* case the specific agreement was that the special fund created by the special sale was to be used for the payment of particular creditors. There was a special contract as to the purpose for which the account might be used. In this case the use of Bankrupt's account was not in any way a part of the “understanding” between the Bank and the Bankrupt. In the *Loble* case there was a diversion of funds from the specific use for which the particular account was created. In this case the account was not created for any particular purpose, nor were any funds deposited in it for any particular purpose, nor was there any restriction of any kind on the Bankrupt's right to make such use of the account as it saw fit. The distinction is that in the *Loble* case the bank diverted the money in a manner contrary to the express agreement; in effect, it took the money deposited with it for safekeeping, as in the case of *Lyman v. Belfast National Bank*, 98 Me. 448, 57 At. 799, and used it in a manner not permitted by that agreement. In this case there was no agreement of any kind. The Bankrupt's account was in all respects and at all times a gen-

eral commercial account, and the Bank's exercise of the setoff was not inconsistent with what it had done before.

The Appellee, at page 31 of his brief, states that he is unable to see why it should make any difference that in the *Loble* case the setoff was exercised before bankruptcy, while in this case it was exercised after the petition in bankruptcy was filed. There is a reason, and a very cogent one, why the exercise of the right after the petition in bankruptcy was filed was in all respects proper. It will be remembered that the agreement between the Bankrupt and the Bank in this case was that the Bank would refrain from pressing the Bankrupt for payment in full of the balance owing it "providing the monthly payments of 10% were made." (Transcript of Record, p. 18, Finding of Fact paragraph 5). The filing of the petition in bankruptcy was an admission by the Bankrupt that it could not keep its part of the agreement; that is, that it could not make the 10% monthly payment as it had agreed. The Bank was therefore free to proceed to collect the full amount owing it. The only promise of the Bank, even as to setoff, was conditional. When the condition was breached, all rights, including setoff, were restored.

Appellee contends that it is "inequitable" to permit the Appellant Bank to make use of its set-off. If what Appellee means by "inequitable" is that the exercise of the right of set off by Appellant affords to it a greater percentage of its claim than that which will be received by other general creditors who were not indebted to the Bankrupt, and consequently do not

have such a right, this may be true. But it is suggested that, while the exercise of such a right may result in an "unequal" distribution, it is not "inequitable" any more than the unequal distribution which results from payment of a greater amount to a secured or preferred creditor. This right of setoff is one factor taken into consideration by a bank in making a loan to a depositor. And it is no different from the same right which is granted to every other creditor of the bankrupt who may buy from as well as sell to the bankrupt or in any other manner or for any other reason become indebted to the bankrupt. Quite obviously Congress does not consider this right inequitable because it has been expressly confirmed in Section 68a of the Bankruptcy Act.

The Bank had the right of setoff at the time the Bankrupt failed to make the June payment. When it filed its petition in bankruptcy, the Bankrupt stated to all the world that it could not pay its obligations and it was at that time, after the Bank had given the Bankrupt every opportunity to keep its agreement, that the Bank exercised its right of setoff. Certainly the Bank's actions were not inequitable. On the contrary, it would be grossly inequitable to deny the right of setoff under these circumstances.

One further observation. The statement is made at page 32 of the Appelle's brief that "there is no basis whatsoever for the statement that the Bank account in the *Loble* case was created (if by this is meant newly established or open) as a part of the agreement that was entered into." The account was not newly established

or opened as a result of the agreement. Appellee is correct in that statement, but the *credit balance in the account* was created as a direct result of the agreement. It was the same as if a new account had been opened. A credit was created where there had been a debit, and the credit was established with the express understanding that it was to be used for a strictly limited purpose, and that was in the payment of certain specific creditors. (14 F. 2d page 116, Appellant's Brief p. 26). The important point is not, as the Appellee has inferred, that the Bank did or did not act as a watchdog over the Bankrupt's use of the account; but rather that the Bank, having agreed that the account should be used for a specific purpose, could not thereafter appropriate it to some other purpose. That is precisely the interpretation of the *Loble* case that was pronounced by this Court in the case of *Ingram v. Bank of Cottage Grove* (1928), 29 F. 2d 86, discussed at page 32 of Appellant's brief. It is the same interpretation that has been given by every other court that has considered the *Loble* case.

CONCLUSION

In their conclusion counsel for Appellee state that they have at no time contended, as stated by us, that an extension of time to pay a delinquent obligation operates as an absolute waiver of the right to proceed with the collection of the obligation. In the next paragraph, Appellee asserts that "the uncontroverted finding of the Referee was that the Bank agreed to go along with the Plan and refrain from pressing for immediate payment in full of the indebtedness due, providing that the monthly payments of ten per cent were made," and that because of that agreement, Appellant cannot make use of its set off. We must admit to having some difficulty reconciling these two statements. It seems to us that the second statement is in direct contradiction to the first.

Appellee also stated that "the same condition attached to the obligation of every other creditor participating in the Plan." The extension granted by Appellant Bank had no connection with and was not conditioned upon an extension by the other creditors. The facts are that the Bankrupt went to the Appellant and requested an extension of time within which to pay its matured note; that Appellant granted this conditional extension in the hope that the Bank would be able to work out of its difficulty; that after obtaining this conditional extension from Appellant, the Bankrupt made similar requests of other creditors—acting separately in each instance—and obtained the consent of *some* of them to defer enforcement of their claims until the Bankrupt had an opportunity to try to reduce its in-

debtedness in the ordinary course of business with the hope and expectation, after having done so, of continuing in business; that there was no general plan and no agreement of any creditor to grant an extension of time or other indulgence in consideration of or in reliance upon the agreement of any other creditor; that there was no agreement whatsoever that the amount should be used for any purpose; that the Bankrupt failed in its efforts to accomplish this purpose and decided to file a petition in bankruptcy, and that, after the petition was filed and it was clear that the purpose could not be accomplished, Appellant exercised its legitimate right of set-off covering the balance in the commercial account.

If such action on the part of Appellant estops or precludes it from exercising its right of set-off, it necessarily follows that, under such a construction of the statute, the only possible alternative remaining for a banking institution, or any creditor having a potential set-off, is to refuse to cooperate with debtors in the solution of their financial problems and to exercise its right of set-off at the first opportunity, regardless of the consequence. This, we respectfully urge, is not and was never intended to be the law and certainly is not in the best interests of any of the parties.

Respectfully submitted,

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No. 14842

United States
Court of Appeals
for the Ninth Circuit

FISHER CONSTRUCTION COMPANY, LTD.,
Appellant,
vs.
C. W. LERCHE, Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant.

BREACH OF CONTRACT

Plaintiff complains of the defendant and for a first cause of action alleges:

1. That plaintiff is a resident of the territory of Guam, that defendant is a corporation organized and existing under the laws of the territory of Hawaii, and that the subject matter of this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

2. That on the 29th day of September, 1952, plaintiff and defendant made a contract of employment, the terms of which are set out in Exhibit "A" attached hereto and made a part hereof.

3. That plaintiff entered upon his employment under said contract, and duly performed all the conditions thereof on his part until the defendant refused, as hereinafter mentioned, to permit him to continue further in his employment thereunder; that plaintiff has always been, and is now, ready and willing to perform all the terms, requirements, and

conditions of said contract on his part, and has heretofore offered to perform the same.

4. That defendant, through its president, A. M. Fisher, on the 24th day of May, 1954, refused, and has ever since refused, to allow plaintiff to perform the duties and conditions on his part of said contract of employment, and refuses to pay him thereunder or therefor, to plaintiff's damage in the sum of Three Thousand Six Hundred and Fifty-Seven Dollars (\$3,657.00), and in the additional sum of Ten Thousand Dollars (\$10,000.00) as general damages.

For a second cause of action, plaintiff alleges:

1. Re-alleges paragraphs 1, 2, 3 and 4 of his First Cause of Action herein as though set forth in full.

2. That defendant corporation, in its Guam operation, from September 29, 1952, to May 24, 1954, made a net profit before Guam and United States income taxes in the sum of Eighty One Thousand Seven Hundred and Thirty Dollars (\$81,730.00).

3. That defendant has refused to pay plaintiff a sum equal to ten per cent (10%) of the net profit of the Guam operation of said defendant to plaintiff's damage in the sum of Eight Thousand One Hundred Seventy-Three Dollars (\$8,173.00).

For a third cause of action, plaintiff alleges:

1. Re-alleges paragraph 1 of plaintiff's First Cause of Action as though herein set out in full.

2. That plaintiff was employed by defendant within the territory of Guam from the 29th day of September, 1952, to the 24th day of May, 1954, and during that time for a period of seventy-one (71) weeks used his own private motor vehicle in the service of defendant.

3. That defendant is indebted to the plaintiff in the sum of Seven Hundred and Ten Dollars (\$710.00) for the maintenance and use by plaintiff of his own motor vehicle in the service of defendant for a period of seventy-one (71) weeks, and that defendant is further indebted to plaintiff in the sum of Two Thousand Three Hundred and Four Dollars (\$2,304.00) for the return transportation of plaintiff and his family from Guam to the west coast of the United States.

4. That no part of said sum of Three Thousand and Fourteen Dollars (\$3,014.00) has been paid although the plaintiff has demanded the same from the said defendant.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty Four Thousand Eight Hundred Forty-four Dollars (\$24,844.00), and for costs of suit.

/s/ E. R. CRAIN,
Attorney for Plaintiff.

EXHIBIT "A"

[Letterhead of Fisher Construction Company, Ltd.]

Mr. C. W. Lerche

September 29, 1952

P.O. Box 150, Agana, Guam

Dear Mr. Lerche:

The following will serve to confirm our verbal agreement relative to your employment with us.

You are to be employed by us in the capacity of Administrator at a salary of One Hundred Seventy Five (\$175.00) Dollars per week, less whatever advances have been made or will be made to you. In addition to this amount you will receive a bonus at the end of the year amounting to ten per cent of the net profits of the Guam operation before Federal and Guamanian income taxes have been deducted.

It is understood that this agreement shall be for a period of two years. Should we cease operation before the end of that period we agree to provide transportation to the West Coast of the United States for yourself, Mrs. Lerche and your two children.

The entire agreement is based on you giving the business your undivided attention and maintaining a high personal standing in the community.

Very truly yours,

Fisher Construction Company, Ltd.

/s/ A. M. Fisher, President

Accepted by /s/ C. W. Lerche, 29 Sept. 1952.

[Endorsed] Filed Sept. 30, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now defendant in answering the complaint of the plaintiff on file herein admits, denies and alleges as follows:

First Cause of Action

1. Answering the allegations contained in Paragraph 1 of said cause of action, admits the allegations therein contained.

2. Answering the allegations contained in Paragraph 2 of said cause of action, admits the allegations therein contained.

3. Answering the allegations contained in Paragraph 3 of said cause of action, denies each and every allegation therein contained.

4. Answering the allegations contained in Paragraph 4 of said cause of action, admits that defendant discharged plaintiff, but except as hereinbefore admitted denies each and every allegation therein contained.

Second Cause of Action

5. Answering the allegations contained in Paragraph 1 of said cause of action, admits the allegations contained in Paragraphs 1 and 2 of the first cause of action, but except as hereinbefore admitted, denies each and every allegation contained in said paragraph.

6. Answering the allegations contained in Paragraph 2 of said cause of action, denies each and every allegation contained in said paragraph.

7. Answering the allegations contained in Paragraph 3 of the said cause of action, admits that defendant has refused to pay plaintiff any portion of its net profits, but except as hereinbefore admitted, denies each and every allegation contained in said paragraph.

Third Cause of Action

8. Answering the allegations contained in paragraph 1 of said cause of action, denies each and every allegation contained in said paragraph.

9. Answering the allegations contained in Paragraph 2 of said cause of action, denies each and every allegation contained in said paragraph.

10. Answering the allegations contained in Paragraph 3 of said cause of action, denies each and every allegation contained in said paragraph.

11. Answering the allegations contained in Paragraph 4 of said cause of action, denies each and every allegation contained in said paragraph.

12. Except as hereinbefore expressly admitted, defendant denies each and every allegation contained in said complaint.

Wherefore, defendant prays plaintiff take nothing by his complaint and it be dismissed hence with its costs.

TURNER & STEVENS,
Attorneys for Defendant

/s/ By LYLE H. TURNER

[Endorsed]: Filed Nov. 19, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

E. R. Crain, Attorney for the Plaintiff; Turner and Stevens, Attorneys for Defendant.

Time: January 11, A.D., 1955 at 9:30 a.m.

I. Pleadings:

Under date of September 30, 1954 the plaintiff filed his complaint, stating three causes of action. For the first cause of action he alleges that he entered into a contract of employment under date of September 28, 1952 under the terms of which he was to be employed by the defendant for a period of two years at a salary of \$175 a week, and that he was discharged on May 24, 1954, to his damage in the amount of \$3,657.00 and \$10,000.00 general damages. For a second cause of action he alleges that under the terms of his employment agreement he was to receive a bonus of ten percent of the net profits in the amount of \$8,173.00. For a third cause of action he alleges that he was required to use his personal automobile in the service of the defendant for 71 weeks in the amount of \$710.00, and that under the agreement he is entitled to return transportation for himself and family to the United States at a cost of \$2,304.00. The plaintiff seeks total damages in the amount of \$24,844.00.

The defendant filed an answer in which it admits that a contract was entered into and that the defendant was discharged. In answer to the second

cause of action it admits that it has refused to pay plaintiff any portion of its net profits but denies otherwise. In answer to the third cause of action it denies each paragraph thereof.

II. Conference:

At the pretrial conference the plaintiff contended that he performed satisfactorily under the terms of the agreement and that his salary had been increased from \$175 to \$200 per week; that he has not been paid the bonus due him or the other amounts claimed; that he attempted to keep down damages by engaging in other activities but the amounts earned by him were not made clear at the conference.

The defendant contended that the plaintiff was discharged for the reason that he failed to perform his duties satisfactorily; that he failed to devote his undivided attention to the business of the defendant and that he failed to maintain the high personal standing in the community required by the agreement.

III. Witnesses for the Plaintiff:

1. The plaintiff will testify to the entering into of the employment agreement and to the satisfactory performance of his duties thereunder.

2. Mr. Dieckman, a construction man, will testify that the plaintiff performed his duties satisfactorily.

3. Paul Parker will testify that the plaintiff performed his duties satisfactorily.

4. Jack Cook, a construction man, will testify that the plaintiff performed his duties satisfactorily.

5. Fred Poole, an employee of the Government of Guam, will testify that the plaintiff performed his duties satisfactorily.

6. Captain Airol, contracting officer for the United States Air Force, will testify to the satisfactory performance of plaintiff's duties.

7. Roy Cox will testify as to the satisfactory performance of plaintiff's duties.

IV. Witnesses for the Defendant:

1. Mr. Fisher will testify that the agreement was entered into and that the service of plaintiff became unsatisfactory and more particularly that he failed to estimate jobs properly, leading to losses or lack of profits; that he failed to account for material delivered for use on the job sites; that he failed to maintain an adequate material inventory, leading to increased cost of local purchases or delay in construction; that he failed to devote his undivided attention to the interest of his employer.

2. Mr. J. M. Morrison, an employee of defendant, will testify to the unsatisfactory service of the plaintiff.

3. Paul Bitting will testify to the unsatisfactory service of the plaintiff and his failure to devote his undivided attention to his work.

4. Richard Yamaguchi will testify to the unsatisfactory service of the plaintiff.

5. Pat Wright, an electrical subcontractor, will testify to the unsatisfactory service of the plaintiff and to his unsatisfactory standing in the community.

6. Paul Bogovich will testify that plaintiff's standing in the community is bad.

7. George Selwyn will testify that plaintiff did not pay his just debts and his standing in the community is bad.

8. James H. Van Sickland will testify that plaintiff did not pay his debts and his standing in the community is bad.

9. Mrs. Carlino Rosario will testify that plaintiff did not pay his just debts and that his standing in the community is bad.

V. Admissions:

1. The defendant admits that the agreement was entered into and that plaintiff is entitled to a bonus for the period of his employment based upon profits, if any.

2. The defendant admits that plaintiff's salary was increased to \$200 per week at a date prior to his discharge.

VI. Stipulation:

The parties stipulated that either party may call additional witnesses by giving the opposing party ten days' notice prior to trial with a statement of what the witness will testify to and by filing a copy of such notice in court.

VII. Issues for Trial:

1. Whether the defendant breached its contract with the plaintiff without cause and if so, the measure of damages.

2. Whether the plaintiff's conduct and lack of

performance was such that the defendant was warranted in discharging him.

VIII. Order:

It is herewith ordered:

The above entitled action is set for trial March 7, 1955 at 9:30 a.m.

Dated and entered this 11th day of January, A.D., 1955.

/s/ PAUL D. SHRIVER,
Judge

Approved:

/s/ LYLE H. TURNER,
Attorney for Plaintiff

[Endorsed]: Filed Jan. 11, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial, and the Court having dismissed counts 2 and 3 of the complaint herein at the conclusion of Plaintiff's case, and having heard and considered all of the evidence upon count 1 of said complaint, and being fully advised in the premises, the Court now finds the following:

Findings of Fact

1. Plaintiff and Defendant entered into a contract, on the 29th day of September, 1952, whereby plaintiff was employed by defendant for a period of two (2) years from the date of said contract, at a salary of One Hundred Seventy five Dollars (\$175.00) per week.

2. Commencing February 1, 1954, defendant increased the compensation of plaintiff under said contract to Two Hundred Dollars (\$200.00) per week.

3. While defendant was in some degree dissatisfied with plaintiff's performance under said contract, said performance was accepted by defendant, and defendant breached said contract by discharging the plaintiff without notice and without cause under the terms of said contract on the 24th day of May, 1954.

4. That plaintiff would have earned the total sum of Three Thousand Six Hundred Dollars (\$3,600.00) had he been permitted to complete his contract with defendant and that from the date of his discharge to the 29th day of September, 1954, plaintiff earned a total sum of Four Hundred Dollars (\$400.00).

Conclusions of Law

From the foregoing facts the Court concludes:

1. That Plaintiff is entitled to judgment against the Defendant in the sum of Three Thousand Two Hundred Dollars (\$3,200.00).

2. That Plaintiff is entitled to his costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 21st day of April, 1955.

/s/ PAUL D. SHRIVER,
Judge

[Endorsed]: Filed April 21, 1955.

District Court of Guam, Territory of Guam

Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant.

JUDGMENT

The above entitled action came on for trial before the Court without a jury, on the 11th day of April, 1955, at the Courthouse in the Guam Congress Building, in the City of Agana, territory of Guam, the Plaintiff appearing in person and by his attorney, E. R. Crain; and the Defendant appearing by its president, A. M. Fisher, and its vice-president, James Morreson, and by its attorney, Lyle H. Turner, and testimony having been offered by the parties, and the Court having filed its findings of fact, conclusions of law, and order for judgment, it is hereby

Ordered, adjudged and decreed, that the Plaintiff, C. W. Lerche, have judgment against the Defendant in the sum of Three Thousand Two Hundred Dollars (\$3,200.00), and for his costs and disbursements in this action, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of Thirty-seven Dollars (\$37.00).

Dated this 21st day of April, 1955.

/s/ PAUL D. SCHRIVER,
Judge

Entered in civil docket April 21, 1955.

Costs taxed this 29th day of April, 1955.

ROLAND A. GILLETTE, Clerk

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fisher Construction Company, Ltd., defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 21st day of April, 1955.

Dated: April 28, 1955.

SPIEGEL, TURNER & STEVENS,
Attorneys for Appellant

/s/ RUSSELL L. STEVENS

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

STIPULATION THAT EXECUTION AND
PROCEEDINGS BE STAYED

Bond in the sum of \$4,500.00 having been filed herein by defendant, counsel for plaintiff and defendant hereby stipulate, subject to approval of the Judge of the District Court of Guam, that execution and other proceedings herein be stayed pending appeal herein, and that the writ of execution heretofore issued herein be, and the same hereby is, set aside and vacated.

Dated: Agana, Guam, May 16th, 1955.

TURNER & STEVENS,
/s/ By RUSSELL L. STEVENS,
Attorneys for Defendant

/s/ E. R. CRAIN,
Attorney for Plaintiff

Approved: Date:

/s/ PAUL D. SCHRIVER,
Judge, District Court of Guam

[Endorsed]: Filed May 17, 1955.

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of counsel for defendant, and the court being fully advised in the premises, it is hereby ordered, adjudged and decreed that the de-

fendant may and it does have until and including June 20, 1955 in which to file herein its designation of points on appeal and the record to be transcribed.

Dated: Agana, Guam, the 10th day of June, 1955.

/s/ PAUL D. SCHRIVER,

Judge, District Court of Guam

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of counsel for defendant, and the Court being fully advised in the premises, the time of defendant within which to file herein its designation of points on appeal and the record to be transcribed is hereby extended to and including July 6, 1955.

Dated: Agana, Guam, the 20th day of June, 1955.

/s/ PAUL D. SCHRIVER,

Judge, District Court of Guam

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME

It is hereby stipulated by and between counsel for Plaintiff and Defendant that defendant shall have to and including the fourteenth day of July,

1955 within which to file herein its designation of points on appeal and record to be transcribed, and the time for filing the record on appeal and docketing the appeal of the above entitled cause in the United States Court of Appeals for the 9th Circuit be, and it is hereby extended to and including the 22nd day of July, 1955.

Dated: Agana, Guam, the 6th day of July, 1955.

TURNER & STEVENS,

/s/ By LYLE H. TURNER,
Attorney for Defendant

/s/ E. R. CRAIN,
Attorney for Plaintiff

Approved: July 6, 1955.

/s/ Judge JOSE C. MANIBUSAN,
For Judge Paul D. Schriver

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Defendant-appellant herewith presents the points upon which it claims the court erred:

1. The court erred in excluding evidence of plaintiff's unsatisfactory performance of his duties before February 1, 1954.

2. The court erred in holding that defendant had breached the employment contract.

3. The court erred in the measure of damages applied.

4. The judgment and the conclusions of law are contrary to the findings of fact herein entered.

5. The judgment and findings of fact are contrary and opposed to the weight of the evidence.

Dated: This 2nd day of July, 1955.

SPIEGEL, TURNER & STEVENS

/s/ By GERALD G. WOLFSON,

Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD
ON APPEAL

Defendant-appellant, by its attorneys, hereby designates, pursuant to Rule 75 of the Federal Rules of Civil Procedure, the following, to constitute the transcript of record on appeal in the above entitled case:

1. Complaint.
2. Answer.
3. Pretrial Order dated January 11, 1955.
4. All exhibits and documentary evidence admitted into evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment.

7. Notice of Appeal.
8. Stipulation that Execution and Proceedings be Stayed.
9. Order for Extension of Time dated June 10, 1955.
10. Order for Extension of Time dated June 20, 1955.
11. Transcript of Proceedings at the Trial.
12. Defendant's Notice of Appeal.
13. Statement of Points on Appeal.
14. Designation of Record on Appeal.

Dated: This 2nd day of July, 1955.

SPIEGEL, TURNER & STEVENS

/s/ By GERALD G. WOLFSON,

Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M.I., do hereby certify that the following documents, to wit:

1. Complaint, filed September 30, 1954.
2. Answer, filed November 19, 1954.
3. Pre Trial Order, filed January 11, 1955.

4. Findings of Fact and Conclusions of Law, filed April 21, 1955.

5. Judgment, entered and filed April 21, 1955.

6. Notice of Appeal, filed May 2, 1955.

7. Stipulation That Execution and Proceedings be Stayed, filed May 17, 1955.

8. Order for Extension of Time, filed June 10, 1955.

9. Order for Extension of Time, filed June 20, 1955.

10. Stipulation Extending Time, filed July 6, 1955.

11. Statement of Points, filed July 11, 1955.

12. Designation of Record on Appeal, filed July 11, 1955.

13. Court Reporter's Transcript of Proceedings, are the original documents filed in the office of the Clerk of this court in the above entitled case.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M.I., this 12th day of July, A.D., 1955.

[Seal] /s/ ROLAND A. GILLETTE,
 Clerk

[Endorsed]: Filed July 14, 1955.

District Court of Guam, Territory of Guam

Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

April 11, 1955, Agana, Guam

Before: The Honorable Paul D. Shriver, Judge.

Appearances: For the Plaintiff: E. R. Crain, Attorney at Law, Agana, Guam. For the Defendant: Lyle H. Turner, Turner & Stevens, Attorneys at Law, Agana, Guam. [1*]

Monday, April 11, 1955, 9:30 a.m.

The Court: First order of business?

The Clerk: Civil Matter 63-54, C. W. Lerche vs. Fisher Construction Company, Ltd. coming on for trial.

The Court: Plaintiff ready?

Mr. Crain: Yes, sir.

The Court: Defense ready?

Mr. Turner: Yes, sir.

The Court: What about the pretrial order?

Mr. Crain: If the court please, the pretrial order does not show that the books and tax returns would

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

be made available to the plaintiff and I feel that they should in view of the fact that they were not furnished until last Thursday night.

The Court: This pretrial order was entered on the 11th of January.

Mr. Crain: That is correct.

The Court: Why is the objection delayed until April 11?

Mr. Crain: I brought it up a number of times—one time at the time the other trial date was set it was brought up. At the time Mr. Stevens said the books would be made available.

The Court: I mean the absence of the stipulation in the pretrial order should have been called to the court's attention before this time.

Mr. Crain: I have called it to the court's attention on several occasions.

The Court: Well, I realize that and, of course, the court [2] continued the case. It was originally set for March.

Mr. Crain: That continuance was at Mr. Stevens request, not mine.

The Court: That was made at your request?

Mr. Crain: No, sir. I made the original request but I withdrew my request and it was continued at Mr. Stevens'.

Mr. Turner: If it please your Honor, the books are in Honolulu.

Mr. Crain: That is begging the question.

Mr. Turner: No, it is not begging the question. We will leave it up to the court. It is my understanding last Monday there was supposed to be a

man up from the company and he never came. The first time I had a application to look at the books was the end of last week.

Mr. Crain: You haven't been here.

Mr. Turner: I have discussed it with Mr. Stevens. We can't expect to keep books here and not have them in Honolulu.

The Court: The court's recollection is that at the time this case was originally continued until today that Mr. Crain informed the court that the accountant whom he wishes to employ to examine into the books was so busy with income tax work that he would not be available to make the required examination and to go to trial at the time it was set.

Mr. Crain: That was my original contention when I came in and at that time the court said to me exactly what the court [3] said last week: "Go ahead and try the case and we will worry about these accounting problems later," and I said all right. It was Mr. Stevens who came in after that and asked for the continuance and I said, "No objection," but I did not get the last continuance in this case or the only continuance and we couldn't audit books that were not here.

Mr. Turner: I would like to state for the record, though, your Honor, those books were sent to Honolulu for the normal and ordinary audit of the company because the head office was there and it has been a period of four months.

Mr. Crain: If the court please, the books went back to Honolulu in November and the subject of

availability first came up at the pretrial conference, January 11, and I said we would go to Honolulu to find out what was missing.

Mr. Turner: The big point is no effort was made on the part of the plaintiff to get an audit.

Mr. Crain: The court knows that isn't true.

The Court: As I understand it, the books are here now?

Mr. Crain: They arrived last Wednesday night at midnight—what they say are the books.

The Court: Well, call your first witness.

Mr. Crain: Mr. Lerche.

MR. C. W. LERCHE

plaintiff, called as a witness in his own behalf, was duly sworn and testified as follows: [4]

Direct Examination

Q. (By Mr. Crain): Please state your full name. A. Carl William Lerche.

Q. You will have to speak a little more loudly. We have no PA system.

A. Carl William Lerche.

Q. Where do you live, Mr. Lerche?

A. In Maite.

Q. How long have you been in Guam?

A. Since February of 1950.

Q. For whom did you come to Guam?

A. For the Vinnell Construction Company.

Q. What was your position with Vinnell Construction Company? A. Project engineer.

Q. How long did you remain in the employ of Vinnell?

(Testimony of C. W. Lerche.)

A. About two years. I completed two full employment contracts.

Q. Did you hold the same position with them during all that time? A. Yes, sir, I did.

Q. In relation to the project manager on those jobs where did your job fall?

A. Immediately below the project manager.

Q. How many project managers did Vinnell have during that [5] period of time? A. Five.

Q. After you had completed your second contract with Vinnell for whom did you work?

A. The Government of Guam.

Q. What was the nature of your job there?

A. Head of Engineering and Planning.

Q. How long were you with the Government of Guam? A. Six months exactly.

Q. Why did you leave the employ of the Government of Guam?

A. Because it was impossible for me to function in such a manner that the work I was intended to perform could be carried out.

Q. Were you on a probationary period with your employment with the Government of Guam?

A. Yes.

Q. How long did that continue?

A. Six months probationary.

Q. Did you or the Government of Guam request release from the contract?

A. I requested release approximately 90 days before.

(Testimony of C. W. Lerche.)

Q. Was that granted? A. Yes.

Q. What is your educational background?

A. I went to engineering school in Denmark. I came to [6] the United States in 1921 and I have been in the construction business ever since.

Q. When were you employed by Fisher Construction Company, Ltd.?

A. About the 17th of September 1952.

Q. Did you enter into a contract with Fisher?

A. Yes.

Q. Do you recall the date of that contract?

A. I think it was the 28th or 29th of September.

Q. Of 1952? A. Yes.

Q. By the terms of that contract how long were you to work for Fisher Construction Company?

A. Two years.

Q. Where? A. On Guam.

Q. What was the salary stated?

A. \$175 a week plus 10 percent of the profits before taxes of the Guam operations.

The Court: The contract, of course, speaks for itself. Shouldn't that be introduced? I think it's admitted.

Mr. Crain: It's admitted.

Mr. Turner: Do you have the original?

Mr. Crain: No, it's in Fisher's file.

Q. (By Mr. Crain): Is the contract as set out in Exhibit A [7] attached to the complaint the contract that you signed with Mr. Fisher?

A. I believe so.

(Testimony of C. W. Lerche.)

Q. You have read it and it compares to be the same? A. Yea.

The Court: The defendant doesn't question it?

Mr. Turner: No, we will stipulate Exhibit A to be the contract.

Q. (By Mr. Crain): What was the date of the termination of your employment with Fisher Construction Company?

A. 24th of May 1954.

Mr. Crain: Incidentally, if the court please, I would like to have the witnesses who will testify later for the defendant excluded from the courtroom. There are several here I know.

The Court: Any objection, Mr. Turner?

Mr. Turner: The only trouble—I do want to keep the officers of the defendant.

Mr. Crain: I have no objection to Mr. Morrison or Mr. Fisher, but I mean the other witnesses here.

The Court: In the case of C. W. Lerche vs. Fisher Construction Company, Ltd. all witnesses who expect to testify or who have been subpoenaed to testify in this case will remain out of the courtroom until after their testimony has been given, except Mr. Morrison and Mr. Fisher and, of course, Mr. Lerche.

Mr. Crain: What was my last question? [8]

(The reporter read the last question and answer.)

Q. (By Mr. Crain): At the time you were terminated had you completed your contract with Fisher Construction Company? A. No, sir.

(Testimony of C. W. Lerche.)

Q. What was the job that you were hired for?

A. Contract administrator.

Q. Is that—excuse me, I didn't hear that.

A. Contract administrator.

Q. Is that the job that you performed during the months you were on the Fisher payroll?

A. That and additional work.

Q. What was the nature of the additional work?

A. A certain amount of field supervision.

Q. Subsequent to your employment did the company send another man out here to be the contract administrator?

A. Would you repeat that question?

Q. I said subsequent to the time you were employed did the company later send another man to Guam to be the contract administrator?

A. Yes, sir.

Q. Who was that man? A. Mr. Morrison.

Q. Do you recall when Mr. Morrison arrived in Guam?

A. I believe it was the latter part of February or the first part of March, '53. [9]

Mr. Turner: I am sorry. We can't hear. Can you speak a little louder?

Mr. Crain: Well, I can't help the construction of the building.

Mr. Turner: He can speak a little louder.

Q. (By Mr. Crain): After Mr. Morrison arrived in Guam what was the nature of your duties with the company?

A. I was made assistant to Mr. Morrison.

(Testimony of C. W. Lerche.)

Q. Did your work then primarily consist of supervising construction in the field?

A. Yes, sir.

Q. Did you perform the jobs that were required of you by the company and by the people who were your superiors during the time you were working for Fisher Construction Company?

A. Yes.

Q. Did you give the company your full time and your best efforts during the period you were employed?

A. Yes, sir.

Q. Who informed you that your services with the company were being terminated?

A. Mr. Fisher.

Q. Do you recall the approximate date that Mr. Fisher so informed you of that?

A. 24th of May 1954.

Q. At the time that Mr. Fisher informed you your contract [10] was being terminated were you ready, willing and able to continue in the performance of your contract?

A. Yes, sir.

Q. Did you so inform Mr. Fisher?

A. Yes, sir.

Q. Were you ever given a raise in pay during the time you were working for Fisher Construction Company?

A. About the first part of February 1954 my pay was increased \$25 a week.

Q. Making your pay from that point on \$200 a week, is that correct?

A. Yes.

Q. At that time were you given any explanation as to why you were given the raise?

(Testimony of C. W. Lerche.)

A. Mr. Fisher stated that he found that my services had been satisfactory up until that point and that he wanted me to take on additional work.

Q. If you had remained in the employment of the Fisher Construction Company from May 24, 1954 to September 29, 1954 approximately what would your earnings have been during that period of time? A. In excess of \$3,600.

Q. What did you do from May 24, 1954 to September 29, 1954?

The Court: Would you explore, Mr. Crain, the question—he was terminated on May 24. Now is that the date of his final [11] salary payment or was he given——

Mr. Crain: I will ask that question.

Q. (By Mr. Crain): What was the last day through which you were paid by Fisher Construction Company?

A. I believe it to be May 24 but I can't say that now because I can't remember at what particular day their pay period closed.

Q. Your best recollection is that May 24 was the last? A. Right.

The Court: Do I understand, Mr. Lerche, that you were terminated as of May 24 and you worked up to May 24?

A. I worked the morning of May 24.

The Court: And you were given no severance pay? A. No.

Q. (By Mr. Crain): Did you answer my last

(Testimony of C. W. Lerche.)

question as to what you did from May 24, 1954 to September 29, 1954?

A. I tried to find other employment.

Q. Did you actually find other employment?

A. Yes.

Q. When did you go to work at other employment? A. On the 7th of June.

Q. Of June 1954? A. Yea.

Q. For whom did you go to work?

A. Modern Builders. [12]

Q. Is that the company operated by a Mr. Roy Cox? A. Yes, sir.

Q. Did that company have any jobs contracted for at the time you went with it?

A. They had two jobs that were old sour ones that had to be done over.

Q. They had no new work at that time, is that correct? A. No.

Q. What was to be the nature of your remuneration with Modern Builders?

A. 50 percent of the net.

Q. From the period of June 7, 1954 to September 29, 1954 was there any net profit?

A. No, sir.

Q. Did you draw any money against anticipated profits at that time?

A. I drew about \$400.

Q. During the time that you were employed by Fisher Construction Company were you furnished company transportation for the purpose of supervising the jobs under you?

(Testimony of C. W. Lerche.)

A. Part of the time.

Q. Were there times when you were not furnished such transportation? A. Yes, sir.

Q. Will you tell the court approximately what length of [13] time you were required to furnish your own transportation?

A. About 71 weeks.

Mr. Turner: What was that?

Mr. Crain: 71 weeks.

Q. (By Mr. Crain): Did you have any kind of arrangement with the company, formal or informal, as to reimbursement for the use of your own vehicle? A. No.

Q. What would you consider a reasonable amount?

A. Let me modify that answer because I did have this arrangement when I went to work for them that I was to be furnished transportation during business hours.

Q. From the time you went to work for them how long were you furnished that transportation?

A. All told for a period not to exceed 4 months.

Q. Was that all at the beginning of your employment period or——

A. No, at the time I went to Umatic school job I was furnished the pick-up to provide transportation.

Q. At the time you went to work for Fisher you were furnished an automobile, is that correct?

A. Yes, sir.

(Testimony of C. W. Lerche.)

Q. It is my understanding that that automobile was wrecked? A. That is right.

Q. And what were the circumstances? [14]

A. A friend of mine came up to the house one night and asked to borrow it and when he didn't come back I found it had been wrecked at Barri-gada.

Q. Who paid for the repairs? A. I did.

Q. And it was restored to service?

A. Yes.

Q. And it was subsequently used for the company? A. Yes.

Q. But not by you? A. Yes.

Q. Who used it?

A. Vern Jules, Honolulu.

Q. What kind of a car was it?

A. A Buick sedan.

Q. And after that you used your own vehicle?

A. Yes.

Q. What would you consider the reimbursement per work week for the use of your vehicle on the job to be? A. About \$10.

Q. Per week? A. Um huh.

Q. According to the terms of your agreement with Fisher Construction Company upon the completion of your contract you were to be provided transportation to the west coast of the [15] United States for yourself, Mrs. Lerche and your two children. Was any such transportation ever furnished or offered? A. No, sir.

Q. At the time you went to work for Fisher

(Testimony of C. W. Lerche.)

Construction Company on September 29, 1952 until May 24, 1954 what jobs did that company have on Guam? A. Adelupe School was one.

Q. Were there others?

A. Yes, there were about four Air Force jobs—three Air Force jobs.

Q. That were going at that time?

A. They were just getting started at that time. There was the mezzanine of the nose hangars at Anderson Air Force; there was a water line at Agafo Gumas, a water line at Marbo, the extension to the water line at Marbo and then subsequently there was the water line in the old Engineers section of the Marbo district.

Q. Those were the jobs that were running at the time you went to work? A. Yes.

Q. Who was the local field supervisor for Fisher at that time? A. Mr. Haley.

Q. Is Mr. Haley still with the Fisher Construction Company? A. No, sir. [16]

Q. Was he at the time your services were terminated? A. No.

Q. During the period of your employment with Fisher Construction Company did you have access to the books and records of the company as they pertained to the cost of local operations, job costs, materials costs and so forth?

A. The information that I had was largely on sheets that I kept myself for the benefit of keeping posted on the job. The books were mostly kept in Honolulu. From time to time there was an account-

(Testimony of C. W. Lerche.)

ant out here who did part of the work and Mr. Warashina in Honolulu did the actual accounting and closing of the books.

Q. Could you from your observation of the work that was done on the various projects during the course of your employment come to any conclusion as to whether those jobs individually were performed at a profit or a loss?

A. From my own personal knowledge I know that the company lost money on Adelupe School. On other projects such as Air Forces, Ada's Store, Atkins-Kroll, the Coast Guard job, I believe they made a profit, and that doesn't take in the hospital operation which was a joint venture with other contractors, where I did not have any access to the books.

Q. You mentioned the Coast Guard jobs. Did those Coast Guard jobs originate in Guam?

A. All the mobilization of the work was done in Guam. [17]

Q. Was there certain construction done by you and your forces here in Guam to assist in the handling of those jobs? A. Yes, sir.

Q. What did that consist of?

A. All the barrack buildings, the messhalls and the toilet facilities were prefabricated here on the island and shipped to the various islands.

Q. Do you know whether those materials were charged to the Guam operation or any other operation of Fisher?

(Testimony of C. W. Lerche.)

A. I think they were charged to the Coast Guard. I mean to the Coast Guard job as such.

Q. Have you ever had access to the cost figures on the nurses' home construction or housing at Guam Memorial Hospital or the TB wing of the hospital?

A. No.

Q. I would ask you to give us a list of the jobs that were performed by Fisher Construction Company during the period that you were employed by them. Give us the gross contract figure if you can and give us the best estimate of the profit which might have accrued to that job before taxes.

The Court: Isn't that a generalization?

Mr. Crain: It would have to be a generalization. He hadn't access to the books.

The Court: Of course you are talking about a contract here payable on the basis of net profits.

Mr. Crain: I think we are entitled to set up what we believe the net profits to have been under the circumstances. If the defendant has the books, he can adjust those figures.

The Court: You have to establish a foundation, Mr. Crain, as to what that belief is based upon.

Mr. Turner: It can't be conjecture.

Mr. Crain: I think I have established that it is based on his observation. I previously asked Mr. Lerche if he had any other basis he could use.

The Court: Well, we assume that Mr. Lerche is familiar with the construction business. The types of projects that you were talking about many of them are quite elaborate.

(Testimony of C. W. Lerche.)

Mr. Crain: That is very true.

The Court: And you can't reduce the question of profit to a set formula. There are dozens and dozens of factors which would increase or decrease profit and surely when you talk about a percentage of net profit we have to have something more than conjecture.

Mr. Crain: Well, is it the court's idea that the plaintiff is supposed to prove his profits by the adverse testimony of defendant's accountants?

The Court: Mr. Crain, you normally prove profit and loss, of course, by the books which are kept in the ordinary course of a business operation.

Mr. Crain: Yes, but we didn't operate the business, your [19] Honor.

The Court: But don't you have to rely upon those who did?

Mr. Crain: I don't see why those who kept the books might not have kept any number of sets of books.

The Court: Well now that, of course—you are asking the court to assume percentage as a matter of course.

Mr. Crain: No, I am not but we have not had access to any books.

Mr. Turner: Your Honor, I give you an example—the Campbell-Fisher joint venture books have always been on this island. There has never been any application by the plaintiff to look at them. the Koster-Whyte have always been on this island.

Mr. Crain: You are testifying in this case now.

(Testimony of C. W. Lerche.)

Mr. Turner: I am making a statement in connection with your question. The only things that went to Honolulu for the audit were the ledgers, but all of the original records have always been up there.

Mr. Crain: That is not what we have been told. If the court please, on the basis of what Mr. Turner has been saying, I wish he would put in the record the period of time he has not been on Guam—since the pretrial conference January 11—

Mr. Turner: That has nothing to do with it.

Mr. Crain: I certainly think it does.

The Court: Now, gentlemen, let's not argue about the [20] matter. The point I am raising is what is the best evidence? The best evidence, obviously, is the books that are kept in the ordinary normal course of business. Now before you can introduce secondary evidence which you are attempting to do by Mr. Lerche's estimates as to what the profit could have been, you have to establish that the primary evidence, the best evidence is not available, and to do that you have to show that the books which were kept in the ordinary course of business are not available for introduction by you and otherwise we are in the complete field of conjecture.

Mr. Crain: I withdraw my last question.

Q. (By Mr. Crain): Mr. Lerche, will you give us a list of the jobs that were performed by Fisher Construction Company in Guam or were considered to be a part of the Guam operation and give us the

(Testimony of C. W. Lerche.)

gross contract price that was bid on each one of those jobs?

A. The United States Air Force nose hangars about \$39,000——

Q. What is that?

A. United States Air Force. Agafo Gumas water line about \$44,000. The Adelupe School, \$255,000. The Harmon water line, \$92,800, and the Harmon water line extension, \$6,500 more. Santa Rita power line, \$41,000. Two jobs for Standard Vacuum about \$4,500. A typhoonizing job for United States Air Forces, \$19,800. Pedro M. Ada's store, \$20,000. Atkins-Kroll about \$29,000. The Coast Guard job about \$240,000. I am not entirely [21] familiar with it. Umatic School, \$256,000. The nurses home and quarters—in connection with them was \$1,200,000. That was a joint venture with Koster-White and the TB wing a joint venture with Campbell was about \$1,200,000.

Q. Are there other jobs?

A. There are small ones that are insignificant.

Q. Other small jobs? A. Yes.

Q. Have you ever been given a statement by Fisher Construction Company of the profit or loss on any of these jobs?

A. Yes, in February of 1953.

The Court: February 1953?

A. Yes, I received a letter from Mr. Warashina in Honolulu which set forth the statement of the Fisher Construction Company at that time.

Q. Did that statement cover the whole of Fisher

(Testimony of C. W. Lerche.)

Construction Company rather than just the Guam operation? A. I believe it did.

Q. Did you ever receive from Fisher Construction Company——

The Court: Now again you are talking about a statement which is the best evidence.

Mr. Crain: Well, I am merely laying the background for that statement. I haven't introduced it and I haven't quoted figures from it.

The Court: You are asking what a statement contained. [22]

Mr. Crain: Well, it was not a statement of the Guam operation. That was all I was interested in bringing out.

The Court: Well, do we have the statement so that the witness can examine it and make sure that it is the same statement and that it must have been sent to him for some purpose?

Mr. Crain: Well, he has it here for what it's worth. Would you like to see the statement?

Mr. Turner: Yes.

Mr. Crain: These were not attached to that statement, were they? A. No.

Mr. Crain: Do you have any objection to its introduction?

Mr. Turner: Yes, because it covers the entire operation.

Q. (By Mr. Crain): I would ask you if the letter dated September 29, 1952 and the accompanying balance sheet, financial statement and explana-

(Testimony of C. W. Lerche.)

tory schedules—were those items received by you from Mr. Warashina? A. Yes, sir.

The Court: This was '52?

Mr. Crain: September 29, 1952. I will introduce them on stipulation.

Mr. Turner: I will object, your Honor.

The Court: It would only cover October and November.

Mr. Crain: I don't want to introduce it as far as that is concerned; it makes no difference to me.

The Court: Now just a moment. The witness' testimony was that in February '53 he had received a statement.

Mr. Crain: I want to correct that testimony.

The Court: Well, I don't think you should because this is a statement that was evidently prepared in the period between October and December.

Q. (By Mr. Crain): Is it your recollection that you received it along in February '53?

A. Yes.

The Court: Then just to get the matter clear, Mr. Lerche, this is the only statement you ever received? A. That is correct.

The Court: And did you ever demand an accounting as regards the net profit? A. No.

The Court: You didn't ask for any additional statement yourself?

A. No, I normally didn't think that would come up until the completion of my contract.

The Court: Well, I agree with you that any state-

(Testimony of C. W. Lerche.)

ment as early as that would be of extremely limited value.

Mr. Crain: That is right and covering the whole job operation.

Q. (By Mr. Crain): But you were never given any statement covering the Guam operation showing profit or loss? [24] A. No, sir.

Cross Examination

Q. (By Mr. Turner): Mr. Lerche, you have testified that prior to going to work for Fisher Construction Company, Ltd. you were employed by the Government of Guam?

A. That is correct.

Q. And your employment with them was terminated at the time you went to work for Fisher?

A. Yes.

Q. And that would be about the end of September 1952?

A. I think it was actually the 17th of September.

Q. And in connection with terminating your employment then and going to work for Fisher did Mr. Fisher lend you any money at the time you terminated your Guam contract with the Government of Guam?

A. Yes, when I went to work for him, yes.

Q. After or about the same time?

A. About the same time.

Q. Do you remember how much that was?

A. \$1,200, I believe.

(Testimony of C. W. Lerche.)

Q. Did you make a subsequent loan from Fisher?

A. Yes, after a portion of the loan had been repaid I made a subsequent loan.

Q. Now this \$1,200 that you borrowed had that accumulated [25] in personal bills over a period of time?

Mr. Crain: I don't believe this is proper cross-examination, your Honor.

Mr. Turner: It is relevant.

Mr. Crain: It may be relevant but it doesn't—

The Court: He can describe the conditions of his employment.

Mr. Crain: The question of personal bills I don't see has anything to do with his employment.

Mr. Turner: It all has to do with it.

Mr. Crain: What do his personal bills prior to his employment by Fisher have to do with his employment?

The Court: Because it is one of the factors, according to the question which you entered into—one of the surrounding factors.

Mr. Crain: I don't think that is a proper question to bring out.

The Court: Then you shouldn't have gone into the question on direct examination. Your objection will be overruled. The question is whether this \$1,200 was loaned to you to pay personal bills which you had previously accumulated?

A. Yes, sir.

Q. (By Mr. Turner): And isn't it true, Mr. Lerche, that the loan was made to you by Mr.

(Testimony of C. W. Lerche.)

Fisher so that you would not have outstanding personal obligations at the time you went to work [26] for Fisher Construction Company?

A. No, not necessarily.

Q. You mean that you were becoming current in your personal bills?

A. There was nothing said as to becoming current or not current.

Q. Then how did you happen to borrow this \$1,200? A. Because I needed it.

Q. Did this bring you current?

A. No, sir.

Q. You still had outstanding bills?

A. Yes.

Q. Did the subsequent loan of \$500 bring you current? A. No.

Q. Now you testified that under the agreement you were to receive transportation for you and your family back to the West Coast upon the completion of your contract. Although the exhibit speaks for itself, I would like to have the witness read into the record this one sentence of the agreement. Would you read the last sentence, paragraph 3 in the body of the letter contract, September 29, 1952?

A. "Should we cease operation before the end of that period we agree to provide transportation to the West Coast of the United States for yourself, Mrs. Lerche and your two children." [27]

Q. Now you have testified that you were hired

(Testimony of C. W. Lerche.)

as contract administrator for Fisher Construction Company? A. Yes, sir.

Q. Isn't it true that the letter agreement referred to you as administrator?

A. I believe it refers to me as contract administrator.

Q. I would like to refresh your memory.

A. O.K.

Q. (indicating letter): Does your memory now stand refreshed that you were employed as administrator, not as contract administrator?

A. No, I was employed as contract administrator.

Q. What are the duties of a contract administrator?

A. The office functions and physical functions of administering of a contract.

Q. Would that then mean that you would be in charge of all contracts of Fisher Construction Company, Ltd.? A. That was presumed.

Q. Who would be over the contract administrator in a normal contracting set-up?

A. In the set-up we had it was supposed to be a position that was on the same level as Mr. Fisher's general superintendent at the time.

Q. Who was the general superintendent when you were employed? [28]

A. Mr. Tom Haley.

Q. So you felt that you and Mr. Haley occupied equally high positions? A. Yes.

Q. And no one was above either of you?

(Testimony of C. W. Lerche.)

A. No.

Q. Did that situation continue for very long after you were employed?

A. How long a time, actually, I don't know. I can't recall. I do know this that in order to perform the work that we had for the Air Forces in a proper manner so that we might be able to collect our money and perform within the stipulated time, it became necessary for me to take over the field supervision of the Air Force jobs because Mr. Haley was not able to do it.

Q. What time was this?

A. This was along in the fall of 1952.

Q. 1952 just after you came to work for Fisher Construction Company?

A. About six weeks after, yes.

Q. So after this happened you were administering all of the Air Force contracts both in the office and in the field? A. Yes.

Q. And all of the office administration of all of the Fisher Construction Company contracts? [29]

A. Yes.

Q. And how long did that continue?

A. Until about February of '53.

Q. And what happened in February of 1953?

A. That is the time that Mr. Fisher sent Mr. Morrison out here.

Q. And after Mr. Morrison arrived what were your duties?

A. I was told that I was Mr. Morrison's assistant.

(Testimony of C. W. Lerche.)

Q. Did you still continue to act as contract administrator?

A. No, Mr. Morrison took that over.

Q. What did you do as Mr. Morrison's assistant?

A. Mostly field supervision.

Q. Now this field supervision was supervision on the job of the various contracts that were being performed?

A. And a certain amount of buying of material.

Q. So after February 1953 you not only supervised contracts in the field but you were in charge of purchasing materials for the contracts under your supervision, is that correct?

A. I can't say that I was in charge of it, I did the majority of it.

Q. You did the majority. Can you name some of the jobs that you actually supervised in the field after February 1953?

A. Pedro M. Ada's store in Tamuning, Atkins-Kroll's new salesroom.

Q. Were you in actual field charge of Atkins-Kroll job [30] from the beginning of the job until it was completed?

A. Yes, sir.

Q. When was that job begun?

A. Somewhere around June of 1953, I would say.

Q. And when that job was completed in June of 1953——

A. It was not completed in 1953; it was commenced in 1953, June.

Q. When was it completed?

(Testimony of C. W. Lerche.)

A. I believe in September.

Q. Of 1953? A. Yea.

Q. Did you report the completion of that job to Mr. Morrison in September of 1953?

A. I presume so; I don't know.

Q. At the time you completed the job in September was it completed in accordance with the contract and specifications? A. Yes, sir.

Q. No other work remained to be done?

A. No.

Q. What other jobs did you have? Well, specifically, do you remember a house remodeled for Thomas Curran?

A. Yes, but that was not under my supervision.

Q. You had nothing to do with that job?

Mr. Crain: What was the name?

Mr. Turner: Thomas Curran. C-u-r-r-a-n. [31]

Q. (By Mr. Turner): Were you in charge of the Umatic School job?

A. I was in charge of the administrative functions. Mr. Guy was in charge in the field.

Q. You had no field functions whatsoever in connection with that job?

A. Just coordinating deliveries and setting up schedules of performance.

Q. Now you have testified that in connection with the Coast Guard job certain materials were accumulated here. Isn't it true that those were the materials for the Cocos Island job?

A. No, sir, this was for the job in the Philippines.

(Testimony of C. W. Lerche.)

Q. Were any materials accumulated here for the Cocos Island job?

A. All the material was.

Q. Who was in charge of accumulating that material?

A. Up until the time of my separation from Fisher Construction I was in charge.

Mr. Turner: Would you read that answer please?

(The reporter complied with the request.)

Q. (By Mr. Turner): Do you remember any instructions from Mr. Morrison or Mr. Fisher with reference to the time of starting of construction on Cocos Island job that all of the material was to be accumulated here on Guam?

A. Yes, sir. [32]

Q. And what were those instructions?

A. Not to start the job until all the material was here.

Q. Up until three months in advance of the time of starting of the job?

A. No, sir.

Q. Were all the materials there in advance?

A. No, sir. We ordered from the supplier and the stock of materials up in the warehouse at the hospital when I came to pick them up in the morning to ship them out they were not there.

Q. Which supplier was that?

A. Cook.

Q. And what is his first name?

A. Jack.

Q. Is he in business in Guam or was he then?

A. Yes.

Q. What type of business?

A. Plumbing.

Q. What were these materials?

(Testimony of C. W. Lerche.)

A. Oh, they were certain plumbing fittings that were needed for the job.

Q. Isn't it true that one valve had to be shipped in from Honolulu by air for that Cocos Island job?

A. Not to my knowledge.

Q. You feel that except for the material you were to get from Cook it was all accumulated? [33]

A. That is right, that was what I was told the morning it was to be shipped over that we had all the material in.

Q. You testified that you devoted your entire efforts to the company during the time you were employed by them? A. Yes, sir.

Q. May I ask you if you have ever utilized any of the company equipment for work outside of company activities? A. No, sir.

Q. Did you ever collect any money from anyone in Guam in connection with the use of company materials or equipment, which money was not transmitted into the company? A. No, sir.

Q. Do you remember Mr. Fisher issuing instructions that no material or work was to be done for Mr. Bogovich in the Surf Club?

A. No, sir.

Q. You do know you did order some windows for Mr. Bogovich for the Surf Club?

A. Yes, sir.

Q. When did you order those windows?

A. I believe it was in January 1953.

Q. From whom were those windows ordered?

A. San Diego Glass and Paint.

(Testimony of C. W. Lerche.)

Q. And to whom were they shipped? Who was the consignee?

A. Either Fisher Construction Company or Paul Bogovich. [34] I can't recall.

Q. Is that an action you took on behalf of Fisher Construction Company in taking this window order and sending it off?

A. After Mr. Fisher verbally told me we were awarded the contract for remodeling the downstairs.

Q. Who did Mr. Bogovich pay for those windows?

A. He paid the San Diego Glass and Paint.

Q. Did he ever give you any money for any materials ordered?

A. No, sir.

Q. Never gave you any money for any materials ordered for his building?

A. Well, I may have collected on the part of Fisher Construction the payment that was due. I can't recall that.

Q. You don't remember him giving you any money except for Fisher Construction Company?

A. No, sir.

Q. And for what was that money given? What contract?

A. In December 1953—that reminds me—I said January of 1953 about the purchase of those windows. It was January 1954. In December 1953 we had a high wave which broke the walls on Mr. Bogovich's place of business and the insurance company told us to go ahead and fix it. At that time Mr. Bogovich talked to me about the purchase of the

(Testimony of C. W. Lerche.)

windows and I think it was in January of the following year I actually placed the order [35] for it.

Q. You think you placed the order in January 1954? A. Yes, sir.

Q. Now this money that you were given—that was for Fisher Construction?

A. And it was transmitted to Fisher Construction Company.

Q. And it was for the repair of Mr. Bogovich's building? A. Yes.

Q. And that was the only money you ever received from Mr. Bogovich? A. Yes.

Q. You are sure about that?

A. Yes, I am sure.

Q. Mr. Bogovich never gave you any money to pay for materials that were ordered and then you didn't pay for them when they arrived?

A. No, sir.

Q. You have testified that in February of 1953 you received a statement of account from Mr. Warashina, the accountant for Fisher Construction Company, and that's the paper that you looked at during your direct examination?

A. That is right.

Q. Was that addressed to you?

A. It was addressed to me personally.

Q. Are you a shareholder in Fisher Construction Company, Ltd.? [36]

A. No, sir.

Q. Are you a director?

(Testimony of C. W. Lerche.)

A. At the time it was considered that I was to become a director.

Q. And how did you happen to get this understanding? A. What?

Q. About being a director?

A. You personally drew up the papers for it.

Q. What papers?

A. The incorporation papers.

Q. For Fisher Construction Company, Ltd.?

A. For Fisher Construction, Guam, Ltd.

Q. Isn't it true that the corporation was never formed? A. That is right.

Q. Now you have testified that you drew \$400 from this Modern Builders Supply?

A. Modern Builders, Inc.

Q. Now with reference to the books of Fisher Construction Company, Ltd. you have testified that you made certain notes or journal entries, is that correct? A. No.

Q. Would you testify what knowledge you have of the records of the operations of Fisher Construction?

A. I testified I made certain notes of cost of labor and materials for my own records in the supervision of jobs. As to [37] the general books of Fisher Construction outside of a short period in 1952 when they were trying to set up the books here and they were subsequently transferred to Honolulu, I have had no access or records of the books of Fisher Construction Company.

Q. Isn't it true that when a job is completed

(Testimony of C. W. Lerche.)

there are always returns, materials left over, materials which are returned to the company?

A. At times, yes.

Q. You mean on some occasions there are no materials left over? A. That is right.

Q. Does that happen very frequently?

A. If your buying is right you shouldn't have any surplus.

Q. You mean regardless of the size of the contract if the material is ordered correctly, you have nothing left over?

A. No, if it is a big job there will be form lumber and stuff like that left over.

Q. What kind of a job would there be no materials left over?

A. Oh, 5 to \$10,000, something like that.

Q. I see. Did you always return the materials on contracts under your field supervision when they were completed? A. Yea.

Mr. Turner: If I remember correctly, your Honor, one of the issues, while perhaps not specifically stated or specifically set forth in the pretrial order, was the question of whether [38] Mr. Lerche paid his bills at the time they were due, personal bills.

The Court: Well, of course, that was raised as part of the defense.

Mr. Turner: Yes, I wonder if since Mr. Lerche is now on the stand I might go into that now and save time. It is outside the scope of direct and that is why I raise the question.

(Testimony of C. W. Lerche.)

The Court: I think so. We will take a ten-minute recess at the present time.

(The court recessed at 10:45 a.m. and reconvened at 10:55 a.m., April 11, 1955.)

The Court: Did you want the record to show, Mr. Crain, any objection to Mr. Turner's request?

Mr. Crain: I do object to it. I feel it is improper.

The Court: Just in making the court's ruling, the agreement of September 29 provides that "The entire agreement is based on you giving the business your undivided attention and maintaining a high personal standing in the community," and on direct examination the witness testified he complied with his contract in all respects. The only question of going into unpaid bills and so forth is maintaining a proper standing in the community.

Q. (By Mr. Turner): Mr. Lerche, during the time you were in the employ of Fisher Construction Company, Ltd., that is from September 29, 1952 until May 24, 1954, did you pay your [39] personal bills as they became due?

A. Within reason, yes.

Q. What do you mean "within reason?"

A. A bill may be due on the 10th of the month and it may not be paid until the 15th or 20th. I still say it is within reason.

Q. Did you have any bills you were unable to pay within five or seven days after they were presented to you?

A. Yes, sir.

Q. What were those bills?

Mr. Crain: If the court please, if counsel has

(Testimony of C. W. Lerche.)

records of unpaid bills I think the proper cross-examination would be to bring out those bills specifically rather than these shotgun tactics.

The Court: Well, this is cross-examination.

Mr. Turner: He knows what he didn't pay.

Q. (By Mr. Turner): Did you lease a house from Mrs. Rosario? A. Did I what?

Q. Did you lease a residence from Mrs. Rosario?

A. Yes.

Q. During the period you referred to that you were employed by Fisher Construction Company, Ltd., did you pay your rent on time?

A. Yes and no. When it became a question as to Mrs. Rosario's not acting in accordance with the terms of the lease [40] in extending the option, I refused to pay rent until such time as the court had a chance to decide on it.

Q. And when did this option question arise?

A. The first time it arose was in December of '53.

Q. Did you keep your rental payments current and pay them on time during the period from September 29, 1952 until that option question arose?

A. Yes except for one period when there was the question of Mrs. Rosario owing for water lines and installation on the job.

Q. Did you borrow \$100 from Mr. James Morrison while you were working for Fisher Construction, Ltd.? A. Yes, sir.

Q. Has that been paid? A. No, sir.

Q. Do you have any other unpaid bills that have been accumulated during that period of time?

(Testimony of C. W. Lerche.)

A. I can't answer that.

Q. What do you mean you can't answer it?

A. I don't recollect.

Q. Do you mean you paid—other than James Morrison—you paid all of your personal bills when they became due and owing?

Mr. Crain: Are you speaking of the period he was employed by Fisher? [41]

Mr. Turner: That is right. That is always the period to which I am referring.

A. I think so.

Q. (By Mr. Turner): Are you sure?

A. Well, if I was sure I would say so.

Q. You testified that you were using a car of the company. Was that a Buick? A. Yes.

Q. And you lent it to someone and it was damaged? A. That is right.

Q. Did you have authority to lend that car to that person?

A. No, I found out later I didn't. As a matter of fact I considered it at the moment a matter of complete inconsequence because he was just going a mile up the road to collect a bill and come right back and his own car was tied up at the time.

Q. You testified that you paid for the repairs.

A. Yes, sir.

Q. Did you pay for them at the time they were made or did Fisher have to advance for the payment? A. No.

Q. You paid it all yourself and Fisher did not make any advance for repairs? A. No.

(Testimony of C. W. Lerche.)

Q. What do you mean? The company did not make any advance? A. No. [42]

Q. Now after the Buick was damaged what automobile did you use in your company affairs?

A. I used my own DeSoto.

Q. And did the company furnish any gasoline to you for your own personal car after that time?

A. Yes, sir, gas and oil.

Q. All of the gas and all of the oil you used?

A. That is right.

Q. What about repairs and maintenance for your automobile? Was that furnished by the company?

A. In all instances but one where I paid my own bill.

Q. What about tires? Were they furnished by the company? A. Yes.

Q. Was there any painting or any repairs done on your car?

A. No, the painting I took care of myself.

Q. You paid for it yourself? A. Yes.

Mr. Turner: That is all.

Redirect Examination

Q. (By Mr. Crain): Are you still living on the Rosario property? A. Yes, sir.

Q. Do you have a satisfactory arrangement at this time between yourself and Mrs. Rosario?

A. I have a new lease for three years. [43]

Q. Who drew the original lease that you had with Mrs. Rosario?

(Testimony of C. W. Lerche.)

A. Well, that goes back a long time. The original lease was drawn by Mr. MacArthy and in this lease it stated clearly that I was to have two periods of three years each options after the completion of the first three-year period.

Q. Did you have any subsequent lease drawn?

A. Yes, there was a subsequent lease drawn which was executed in the early part of July, nine months after I moved in on the property.

Q. Who drew that lease?

A. I believe Mr. Turner did.

Q. Were the terms of that lease the subject of the lawsuit against you by Mrs. Rosario?

Q. But that matter has now been settled and you have a new lease with Mrs. Rosario?

A. Yes.

A. I made a countersuit of \$8,000 and it was settled out of court before it came into the District Court and the new arrangement was that I got a new lease for three years.

Q. At the time you went to work for Fisher Construction Company you were informed that there was to be a new company created to be called Fisher Construction Company, Guam, Ltd.?

A. At that time or shortly after.

Q. Did you ever confer with Mr. Turner concerning the [44] details of the formation of that company?

A. Yes, I believe I had a couple of telephone conversations and also one personal call to Mr. Turner's in relation to that.

(Testimony of C. W. Lerche.)

Q. Was it indicated that you were to be an officer in that company? A. Yes.

Q. Was that company ever actually formed?

A. No.

Q. During the time that you were employed by Fisher Construction Company did you ever have any occasion where you were required to pay bills for Mr. Fisher or for the company?

A. At one time it became necessary in the daily operation to buy materials as I needed them on my personal check and be reimbursed by the company.

Q. Why was that necessary?

A. Their credit was cut off.

Mr. Turner: Whose credit? I am not clear.

A. Fisher's credit.

Q. (By Mr. Crain): With what suppliers was Fisher's credit cut off?

A. Pacific Construction Company.

Q. In other words, you were buying materials for cash out of your own pocket to be used on Fisher's jobs? A. Yes.

Q. And to be reimbursed by Fisher, is that correct? [45] A. Yes.

Mr. Crain: I have no other questions.

Recross Examination

Mr. Turner: It is immaterial but I want to clarify one question on that lease, your Honor.

Q. (By Mr. Turner): Isn't it true that lease you signed, the second lease with Mrs. Rosario was

(Testimony of C. W. Lerche.)

prepared by an adviser to her and she would not change the terms of the lease?

A. By an adviser to her?

Q. Yes and she wouldn't change the terms of the proposed lease and that was why it was typed as it was.

A. That I can't tell you, Mr. Turner, because I was not in on those conversations, but I do know the day we walked out of Mrs. Rosario's home down here I told you that that lease was not the terms I agreed upon and you agreed to send her a letter stating that there was going to be, without equivocation, two distinct terms of option.

Q. That is clarification but she wouldn't change the terms of the lease?

A. That may be so.

Q. That was why it was signed because otherwise she wouldn't have given you a lease. Now with reference to cash payments you made out of your own pocket, isn't it true that Fisher Construction Company gave you the money before you bought [46] those materials for cash?

A. No, I issued my check for day-to-day purchases and the following day I went in and got a check from Mr. Morrison.

Mr. Turner: That is all.

Mr. Crain: I have no other questions.

Examination by the Court

Q. I want to ask you, Mr. Lerche, in this letter you received you were employed as administrator?

(Testimony of C. W. Lerche.)

A. That is right.

Q. Now to me an administrator is one who has overall responsibility for all operations included in the business. Now in the construction business does it have a different meaning?

A. I don't know but the instructions were I was to operate on the same level as Mr. Haley.

Q. Now ordinarily wouldn't an administrator have charge of a construction superintendent?

A. I can't talk in generalities because I don't know what meaning people put on the word. The only thing I can tell you I was hired on the same level as Mr. Haley and personally I think that the word "contract administrator" isn't applied to it because that was Mr. Fisher's term of the name of the position.

Q. But in your capacity would you estimate jobs?

A. At that time most of the jobs were estimated in Honolulu.

Q. But did you furnish the basic data for the estimates? [47]

A. No, the plans were sent back to Honolulu and they were estimated back there.

Q. Did you make recommendations?

A. No.

Q. Or give them any estimates?

A. At a subsequent date, yes, but not in the first year, I would say.

Q. Who was responsible for the purchase of materials?

(Testimony of C. W. Lerche.)

A. Even in those days all materials were bought in Honolulu.

Q. But who furnished the requisitions for those materials?

A. Honolulu office on the strength of the bids; they go back there.

Q. Who handled the payrolls?

A. Payrolls were handled by Mr. Haley and the the secretary for the office, Mrs. Rogers.

Q. Were those operations under you?

A. I didn't sign any payroll checks. The payroll checks were all signed by Mr. Haley.

Q. Mr. Lerche, just what did you administer in your capacity as either administrator or contract administrator?

A. What I mostly did was to see that money was collected, prepare monthly estimates for the collection of this money. In other words, so many percentages of certain operations were completed. On the basis of that we billed the Air Force or the private owners, and to see that that money was collected and [48] deposited in the bank.

Q. Then were your overall responsibilities limited to the extent that it was your job to see that the work was being done on schedule and to bill the debtors under the contract in accordance with the contract and to collect the money?

A. It wasn't even my responsibility to see that the work was done on time. It was just my responsibility to collect for whatever work had been performed.

(Testimony of C. W. Lerche.)

Q. You had no responsibility for the supervision of construction?

A. No, sir, that was Mr. Haley's.

Q. Well, if your responsibility, Mr. Lerche, was limited in that way, where was an automobile needed?

A. Well, I had to go to the Air Forces at the rate of at least three times a week at Anderson and there is a lot of running around—the government offices and plans to be picked up and so on and so forth.

Q. But your DeSoto was also used for your family purposes, was it not?

A. The DeSoto was mine.

Q. Yes and used for family purposes?

A. Yes.

Q. And you stated they furnished you gas and oil, maintenance and tires. Was there any breakdown in furnishing that between your family use and the company use? [49]

A. No, except that on week ends I would buy my own gas. I wouldn't draw it from the company.

Q. But if you had to have tires and maintenance, Mr. Lerche, there was no way of making any distinction, was there, between——

A. No but there is a certain depreciation of an automobile over a two-year period.

Q. That takes place when it is a family automobile, regardless, doesn't it?

A. It doesn't take place quite as rapidly as when you use it in your business.

The Court: I have no further questions. You may be excused.

Mr. Crain: Mr. Warashima.

HOWARD H. WARASHIMA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. Howard H. Warashima.

Q. What is your home address?

A. 1822 Beckley St., Honolulu, Hawaii.

Q. Are you employed by Fisher Construction Company?

A. That is right.

Q. Full time? [50] A. No, sir.

Q. Are you in business in Honolulu as an accountant?

A. That is right.

Q. Could you give the court an idea, Mr. Warashima as to what percentage of your time you spend on the books of Fisher Construction Company?

A. Well, it's pretty hard to say what percentage of time because it depends on the time of the year as well as the amount of work that is involved.

Mr. Turner: I didn't hear the last part of his answer.

(The reporter read the last answer.)

Q. (By Mr. Crain): Well, is it correct to state that Fisher is just one of a number of clients you have in your accounting business?

A. That is right.

Q. How long have you had this account?

(Testimony of Howard H. Warashima.)

A. Since the inception of the business of Fisher Construction Company, June of 1950.

Q. You say since June of 1950?

A. That is right.

Q. That's when the company went into business in Honolulu, is that correct?

A. That is right.

Q. Can you tell us when the company went in business in Guam? [51]

A. I can't very well tell you the exact date. It was some time in—well, actually they started the contracts in June of 1950, I believe it was. No, '52; I am sorry.

Q. In Guam?

A. That is right. Prior to that, of course, Mr. Fisher made a couple of trips out here.

Q. Have you kept all of the books of the company since it was created?

A. Exactly what do you mean "kept the books"? You mean made all the entries or anything like that?

Q. In your capacity as accountant what are your duties insofar as Fisher Construction Company books are concerned?

A. Well, that includes doing the office routine and handling the records and entering the records and books and my job is to see that it is entered into the proper accounts and to make the tax returns, as well as giving out financial statements.

Q. In giving out the financial statement did you do audits of the company's books?

(Testimony of Howard H. Warashima.)

A. No, I don't make a complete audit as far as that goes because when you say audit it depends on what type you mean. Exactly what do you mean by "audit?" A complete audit? You mean go over everything?

Q. Yes.

A. I just verify things to the satisfaction of myself that it is entered in the proper account, that the supporting [52] vouchers are there.

Q. Are the Guam books kept as a part of the overall Fisher Construction Company operations?

A. No, sir.

Q. They are separate?

A. That is right.

Q. Have they been separate ever since the Guam operation started? A. That is right.

Q. Where is the supporting data kept?

A. It's in the Guam office mainly but some of them have been sent to Honolulu because when Mr. Fisher is in Honolulu there are certain things he would like to check.

Q. So part of the supporting data for the books are in Honolulu and part is in Guam, is that right?

A. Well, as far as all the stubs of checks that are written and the contracts are in Guam.

Q. Well, what's in Honolulu?

A. As I can recall there is about three months' bank statements that I reconciled in Honolulu and a few of the invoices that were paid by the Honolulu office on the account of Guam.

Q. Isn't it a fact, Mr. Warashima, that practi-

(Testimony of Howard H. Warashima.)

cally all of the purchases of material for use of the Guam operation are made in Honolulu? [53]

A. No, it's not practically all because we have done quite a bit of buying here as well as from the mainland.

Q. A considerable amount is purchased in Honolulu, too, is that right?

A. Purchased from firms in Honolulu but purchase orders given from here and it's earmarked as Guam jobs.

Q. Has there ever been a complete audit of the Fisher Construction Company books since its inception?

Mr. Turner: You mean Guam?

Mr. Crain: No, Fisher Construction.

A. No, there has never been because it's impossible to do a complete audit without an exorbitant price, especially in the construction business because it involves going on the jobs to see the percentage of completion and not every job has an engineer, I mean an architect involved so it's a matter of a person to go out and satisfy himself, who is not an engineer himself. He is an accountant and it is almost impossible.

Q. In other words, there has never been a complete audit of the Fisher Construction Company books? A. No.

Q. Has there ever been a complete audit of the Guam operation since its inception?

A. Well, I don't know what you mean by "complete audit," because as I have explained to you I

(Testimony of Howard H. Warashima.)

have verified the entries in the books and supporting data. [54]

Q. Here or in Honolulu? A. In Guam.

Q. When?

A. I was here in September of '53 and they sent me some records back to be checked and they were returned up until January of '53, I mean '54. I am sorry.

Q. In other words, even your only casual audit of Guam books does not extend beyond January of '54, is that right?

A. No, it doesn't.

Q. You have had no overall supervision of the Guam books since that date?

A. No, I haven't. There is a Mr. Robert C. Miller who has done the work.

Q. Have you had any occasion to verify any of the work that he has done?

A. Well, that is what I am here for now.

Q. Has his work covered the period from January 1, 1954 to the present time?

A. Not quite to the present time. We closed the books as of the fiscal year, May 31, 1954, and he has made some entries in the books from June to December of '54.

Q. He has made some entries?

A. Yes, not complete entries.

Q. And you are in the process of looking over Miller's work at this time, is that right? [55]

A. That is right.

Q. Now isn't it a fact that at least a part of

(Testimony of Howard H. Warashima.)

these books which were brought into Guam by you last Wednesday night have been in Honolulu since last November?

A. Sometime in November.

Q. They have been there continuously, is that right?

A. (Nods head).

Q. What did those books consist of?

A. Journal and ledger.

Q. In other words anyone trying to examine the books in Guam would have had only certain supporting data to look at? They would not have had the advantage of seeing the journal and ledger?

A. Well, naturally because if it's in Honolulu you can't see it.

Q. And it's been there since November?

A. Yes.

Q. I believe you stated previously that you have prepared the tax returns for Fisher Construction Company?

A. Yes, I have.

Q. Does that include the preparation of both federal tax returns and Guam tax returns?

A. Well, Guam tax returns as far as the fiscal year ending in '53 it has been filed but for the fiscal year ending '54, it has not been, and I am here to find out exactly how the [56] statute reads so that I can—you see, it's not very clear as far as the Guam corporation tax statute goes, as I see it, whether outside operations should be included in the return or should be left out but to be incorporated in the balance sheet of the tax returns, and the fact that there was a loss in the fiscal year ending May

(Testimony of Howard H. Warashima.)

31, '54, I did not ask for an extension of time because of no tax and also I took sick since last July and the final federal return was filed on November 15 and I got an extension on that and I was planning on the Guam trip some time in early December, but because of my health I was not able to come down.

Q. In other words, you filed a federal return for the company for the fiscal year of '54, ending May 31, on November 15, 1954?

A. That is right. That is the date I got an extension, too.

Q. But for that same fiscal year you have filed no Guam return?

A. No, I haven't yet.

Q. Is it your understanding that the Internal Revenue Code as applied to corporations is different for Guam than it is for the federal?

A. Well, as far as I see it—I mean I don't know enough about the Guam set-up in regard to Section 251 whether it is reversible in Guam. In 1954 the code number was changed to 931, that is the possessions of the United States. If you are [57] doing business in the Territory of Hawaii and business in the possessions there are certain excludable sections. Whether that is reversed in Guam or not I don't know. That is one of the things I want to straighten out here.

Q. Have you any legal opinion by anyone on that?

A. No, they are vague about that, too.

(Testimony of Howard H. Warashima.)

The Court: We are not getting into income tax, are we? The legality of Section 31?

Mr. Turner: I am not interested in that. I am interested in the fact that Guam should be different from the federal——

The Court: He is supported in that view by some of our local lawyers.

Mr. Crain: Yes, he is. He can't read the mirror——

Q. (By Mr. Crain): What about the gross receipts taxes due and payable to the Government of Guam?

A. That's another thing; I will have to check with the Guam government office as well as our office here.

Q. When were the last gross receipts taxes paid by Fisher Construction Company to the government of Guam?

A. I don't know. In fact I was in the process of trying to look into that.

Q. Would the books reflect it?

A. I am checking the books now.

Q. I would appreciate it.

A. I mean I am checking the books at the office right now [58] to see what has been done and what has been filed. I mean I have been here such a short period of time I haven't been able to go through the books.

Q. You had them in Honolulu before you brought them out here.

(Testimony of Howard H. Warashima.)

A. No, I saw a return over here. I came across one in May 1954.

Q. Isn't it a fact that the last gross receipts filed with the government of Guam was in February of last year? A. I don't know.

Q. Wouldn't your books show it?

A. I am checking Mr. Robert Miller's work now.

Q. Wouldn't it show?

A. Well, I am trying to find out. I haven't seen the checks yet. You want me to go over all that right now to see whether there was any check made to the government of Guam since February last year?

Q. Is that the only way you can check?

A. That is the only way I can see right now.

Q. You haven't checked that point since you arrived?

A. No. If you had told me to I would have done it—gone over the office records.

Q. To your knowledge has there been any request for extension of time to figure gross receipts tax returns?

A. I believe this office did. [59]

Q. But you don't know that they have been paid, is that right?

A. No, and another thing on this gross receipts tax that I have been overlooking at the Guam branch is that prior to July '53 there was some provision in there if you did government contracts, the materials that were bought is deductible, and I wanted to get that thing straightened out.

(Testimony of Howard H. Warashima.)

Q. Well, I am more interested in the last year as to whether the company has filed gross receipts tax returns and paid any gross receipts tax?

A. That I haven't found out yet.

Q. You don't know?

A. (Shakes head).

Q. Did the Fisher Construction Company, Ltd. show their gross profit on the return that was filed to the United States?

Mr. Turner: It should be limited to Guam.

Mr. Crain: The return was filed to the United States government and I think we are entitled to know whether it showed profit or loss.

A. Well, I have a profit and loss statement if you want to see the Guam operation.

Q. (By Mr. Crain): I asked you a simple question——

The Court: Well, now the objection on that is that it's of no help to us in construing this particular agreement which is limited to the Guam operation as to what they did, [60] and the witness has said he has a profit and loss statement.

Q. (By Mr. Crain): For general operation or the Guam operation?

A. Guam operation.

Mr. Crain: But they filed a federal tax return which included the Guam operation.

The Court: What we are interested in here is Guam, just Guam.

Mr. Crain: But I think we pretty well proved

(Testimony of Howard H. Warashima.)

we have nothing for Guam. They haven't filed any tax for 18 months.

The Court: He said he had a profit and loss statement.

Q. (By Mr. Crain): Is that a current profit and loss statement?

A. For the two years ending May 31, 1953 and May 31, 1954 and we have a ledger as well as the journal here that covers these two periods.

Q. Were these statements consolidated with the statement for the entire company operation in preparing your federal tax return?

A. No, well, it's included in the return. When I filed the return the Guam operation is attached to the federal return.

Q. These are attached as they are?

A. That is right.

Q. I believe you told me that at the time you filed the federal return they went ahead and audited the return at that [61] time, is that right?

A. Audited it at that time?

Q. Yes.

A. No, what I stated was that because of the huge loss of the Guam operation as of May 31, 1953 we filed in the carry-back provision and the federal has come in and has given us the refund for the carry-back and Mrs.—I forget her name—the Internal Revenue agent, came over and looked over the books.

Q. What was the net loss sustained by the company in Guam in 1953? A. \$156,275.75.

(Testimony of Howard H. Warashima.)

Q. What was it for 1954?

A. 1954 is \$51,084.22.

Q. In your accounting procedure on Fisher Construction Company books do you keep a cost analysis of jobs?

A. Well, Mr. Lerche will be able to answer that.

Q. I am asking you, Mr. Warashima. You were the one who set the books up.

A. The books were set up in the manner that cost per job should be shown but when I came over and checked them over—well, Mr. Lerche was there too and he knows it too that some purchase orders did not state what job they were. Well, naturally when I questioned him he didn't know exactly what jobs and there was no in-and-out warehouse transactions. Naturally [62] on jobs you will have excess that should be returned to the warehouse and then taken out on the next job when there was the same type of material needed, but those transactions were never recorded so it was almost impossible—

The Court: Do I understand you to say that they did not maintain a warehouse inventory account?

A. No, they did not so whenever it was on invoices and purchase order where it showed the job numbers and all that I put it in the cost account and, for instance, if it's in the material account of the job numbers and if the material is purchased for that job, it is entered in that job, but there was lots of them I did not know what job to charge.

(Testimony of Howard H. Warashima.)

Q. Are you speaking of your visit to Guam in 1953? Is that when you discovered that situation?

A. That was the situation.

Q. How long were you here in September 1953?

A. Well, I was here for about two weeks in late August, '53. I spent about two weeks then I went to the Orient and got back here and spent about ten days here again.

Q. Well, did you set up the books for the Guam operation?

A. That is right, I did.

Q. You set them up from Honolulu?

A. No, not from Honolulu. I was out in '52, June of '52.

Q. You were here in June of '52?

A. That is right, but in setting up the books and carrying [63] them out you have to have cooperation from the management as I see it——

Q. Well at the time you came here in June, 1952 who was the manager?

A. I think it was Mr. Haley; I am not sure.

Q. How long were you here at that time?

A. I can't—oh, just about a week, I believe.

Q. Was that sufficient time to set the books up and train someone to take care of them in your absence?

A. Well, I believe it was. I left notations and memoranda on what should be done.

Q. Did you train a man at that time?

A. No, I did not. What do you mean by "train a man"?

(Testimony of Howard H. Warashima.)

Q. Did you introduce a bookkeeper to the books that you had set up?

A. To the person who was in the office, yes.

Q. Who was that?

A. I think it was Harriet Rogers.

Q. Harry Rogers?

A. Harriet Rogers; it was Mrs. Rogers.

Q. Was she still here in September '53, August or September when you came back?

A. Yes, she was.

Q. Was she still keeping the books?

A. Yes, she was, with the help of Mr. Lim. [64]

Q. Had you had any occasion between June of 1952 and September of 1953 to review the work that was being done on the books in Guam?

A. Yes, I was here, in, I believe it was December '52.

Q. '53 you mean? A. '52.

Q. Did you find that they were not keeping the books properly at that time?

A. I went over with Mr. Lerche, I believe it was. I pointed out what wasn't being done.

Q. Did you go over them with Mrs. Rogers and/or Mr. Lim? A. I did.

Q. But when you came back in September '53 you found they were still not keeping them?

A. Well, as far as putting down the company job numbers on some of the purchases, no.

Q. Did you conduct any correspondence between yourself in Honolulu and the Guam office concern-

(Testimony of Howard H. Warashima.)

ing improper methods of posting books or maintaining records?

A. Well, the books were kept here. When I came here, yes, I did.

Q. Is that the only time you saw the books in those days was when you came here?

A. That is right.

Q. When did you prepare the tax returns for fiscal '53? [65]

A. It was within the period of about August.

Q. In other words, you had to have the books in Honolulu at that time, is that right?

A. I guess I must have filed it later then after I had been back. I am not sure when I filed it. I have the records in my office. I did go through the books. I am sorry if I stated I hadn't seen it prior to that. In preparing this return I did go over the books myself.

Q. In other words, they were shipped to you in Honolulu?

A. I am hazy about whether it was shipped when I was here in August or whether it was after my return in September when I prepared that or not; I am not too sure.

Q. You stated that proper cost records were not kept on the jobs, is that right?

A. That is right.

Q. Was that a serious matter in that on practically none of the jobs were they able to verify their cost?

A. I wouldn't say practically every job.

(Testimony of Howard H. Warashima.)

Q. Could you tell us what jobs you had in mind that you were unable to verify their cost?

A. No, I can't. I don't know which job it is but the fact the job numbers have not been put on but naturally it's entered in the material and cost supply account in the books, therefore——

The Court: Let me see if we can make this clear. You got [66] a requisition for supplies without the job number on it? A. Yes.

The Court: You entered the supplies and you had to debit some account. You debited your material and supply account but you didn't debit any particular job account?

A. That is right, the distribution of it.

The Court: The distribution to any particular job, but it showed up in the total?

A. That is right it shows up in the total and as a part of the cost.

Q. (By Mr. Crain): Is it correct there has been no gross receipts tax for the past or set up for the past two years for the Guam operation?

A. I did set it up in '53, the gross receipts reserve.

Q. Does that show on the fiscal '54 statement? You say at the end of '53 you set it up?

A. No, when I say end I mean the fiscal year ending May 31, '53. Yes, I have a gross receipts tax down here.

Q. That is for the end of '53?

A. That is right.

Q. Is that figure \$10,175.85?

(Testimony of Howard H. Warashima.)

A. Which one?

Q. Is that the proper tax on a gross income of \$511,733.

A. There was a few exclusions. Two percent of that would come out approximately \$10,000. [67]

Q. Is there a gross receipts reserve set up for fiscal '54?

A. I don't see it here. I don't know whether he put it into some other account.

Q. Who do you mean by "he"?

A. Mr. Miller: I don't know whether he has some in taxes and license account or not. Yes, \$1,941.

Q. That is on a gross income of what?

A. \$304,000.

Q. Are the figures that you have in your hands here for fiscal '54 going to be the basis on which you will eventually file an income tax return with the government of Guam for the Guam operations of Fisher Construction?

A. I cannot tell you that because as I didn't have enough time yet to go over his work—whether it will be or not I cannot say.

Q. Was a return filed for fiscal '53 to the government of Guam? A. That is right.

Q. Was it filed on the basis of those figures there? A. That is right, \$156,000 loss.

Q. That return has never been audited by the government of Guam? A. No, it has not.

Mr. Crain: I have no other questions. [66]

Mr. Turner: No questions, your Honor.

(Testimony of Howard H. Warashima.)

Examination by the Court

Q. May I see the statement of the witness, please? A. Yes, sir.

Q. Now as I understand it you prepared this profit and loss statement?

A. For the fiscal year ending May 31, 1953, I did, sir.

Q. And did Mr. Miller prepare the one for '54?

A. That is right.

Q. And the statement that you prepared up until May 31, 1953 showed a net loss on Guam operations of \$156,275.75? A. That is right.

Q. And as to the period ending May 31, 1954 you cannot of your own knowledge state that this is a correct profit and loss statement until you have an opportunity to check——

A. That is right.

The Court: The books which Mr. Miller kept during that period. Very well, that is perfectly clear to me. Thank you very much. Gentlemen, it's nearly 12 o'clock. We will recess until 1:30.

(The court recessed at 11:55 a.m., April 11, 1955 and reconvened at 1:30 p.m., April 11, 1955.)

The Court: Call your next witness.

Mr. Crain: Mr. Morrison, please. I would like the record to show that Mr. Morrison is being called as an adverse witness. [69]

The Court: Very well. Any objection?

Mr. Turner: No objection.

JAMES M. MORRISON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. James M. Morrison.

Q. Where do you live? A. Agana.

Q. By whom are you employed?

A. Fisher Construction Company.

Q. Are you in fact a vice president of Fisher Construction Company? A. That is right.

Q. When did you come to Guam for this company, Mr. Morrison?

A. Originally in January 1953 and then I was back in Honolulu for a couple of months then I came back here in March to stay.

Q. You have been vice president of the company since you came here?

A. That is correct.

Q. What is the nature of your duties insofar as the Guam operation of the company is concerned?

A. Well, I am manager of Guam operations.

Q. Have you been in that capacity since you came here? A. That is correct.

Q. As the Guam manager have the books of the company pertaining to Guam been under your custody and control during that time?

A. More or less.

Q. The keeping of those books has been under your supervision, is that correct?

(Testimony of James M. Morrison.)

A. Actually they have been under Mr. Warashima's direction more than my own.

Q. You have heard Mr. Warashima testify here this morning concerning those books?

A. Yes.

Q. It is my understanding that since you have been here the company has carried on two other joint ventures in connection with other companies, Koster and Whyte and Campbell Construction Company, is that right? A. That is right.

Q. The joint venture with Koster and Whyte has been completed for some time, is that correct?

A. It is physically completed; it hasn't been closed out.

Q. Has the company received any money on the Koster and Whyte job? A. Yes, it has. [71]

Q. Have the receipts from that job been included in the books of Fisher Construction Company, Guam, as we have seen them here today?

A. Well, I didn't see exactly what Mr. Warashima had but, yes, normally all of the receipts are included.

Q. Do you know how much Fisher Construction Company has received from the Fisher-Koster joint venture to this date?

A. Well, the best I could give you would be a guess.

Q. What would be your best guess?

Mr. Turner: I will object, your Honor.

Q. (By Mr. Crain): The gross contract price was \$1,200,000, as I recall it.

(Testimony of James M. Morrison.)

A. Yes, that is approximately right.

Mr. Turner: He said he would have to guess. I think that would be rather foolish to put that in the record.

Mr. Crain: He is the man in charge.

A. If I may say, your Honor——

The Court: You can't expect to have a person testify from memory as to what is contained in the books.

Q. (By Mr. Crain): If you had the books, Mr. Morrison, would you be able to give us the sum that has been paid into your company as a result of the completed work on the joint venture?

A. Yes.

Q. The books are here, aren't they? [72]

A. Well, they were. We thought you were through with that witness; he has gone back to work.

Mr. Crain: I don't think that is an assumption that could be taken. There was no request to excuse that witness, if the court please, or the books.

A. As a matter of fact even if I had the books, it would be a matter of hours to pick it out; it would be extremely difficult.

Q. (By Mr. Crain): Are you certain, Mr. Morrison, that the sums of money that have been paid in on the Koster-Whyte job to Fisher appear in the books at all? A. Oh, yes, I am.

Q. Were those sums all paid in the fiscal year 1954, your fiscal year, that is?

A. No, they were not.

(Testimony of James M. Morrison.)

Q. Well, when were they paid?

A. There was some slop-over to '55.

Q. But some were paid in fiscal '54?

A. Yes.

Q. Is the same true of the Fisher-Campbell job?
Have there been sums paid to Fisher?

A. Yes, there have been.

Q. And they appear on the Fisher-Guam books?

A. Yes, but I am just trying to remember whether there was any in fiscal '54. I think there would have been some. [73]

Q. You have no idea what they would be?

A. No, I haven't.

Q. But you are certain that the sums appear in balance sheets?

A. They appear as cash receipts as everything that comes in appears that way.

Q. What about cost on those jobs—labor cost, material cost—would they also be charged back to your books proportionately?

A. No, they would not.

Q. Only the cash receipts?

A. That is correct because they were set up as separate ventures.

Q. What cash did you receive from those jobs? Would it have been gross sums based upon payments of increments?

A. They were reimbursing our company for money we had spent for the joint venture. If I could explain a little bit—

Q. Yes.

(Testimony of James M. Morrison.)

A. We each carried our own payroll then the joint venture would reimburse each partner for the amount expended on payroll or on supplies or on equipment.

The Court: That necessitated, Mr. Morrison, a separate set of books for each venture?

A. Completely separate, yes.

Q. (By Mr. Crain): What I am getting at—I realize there [74] is a separate set of books for each venture, but is there also a tie-up with Fisher Construction Company books as of this time?

A. Yes, in this way—all the money that came into Fisher Construction had to be accounted for. It is picked up on our books, accounts receivable.

Q. And also the money spent for material and labor? A. Correct.

Q. Is that picked up on Fisher's books afterward or kept current?

A. It's current.

Mr. Crain: I have no other questions of Mr. Morrison, but I do feel that we should have Mr. Warashima or the books available because he was not excused.

The Court: So far as my file shows there was no subpoena issued for Mr. Warashima and the books.

Mr. Crain: That was because Mr. Turner said he would be available.

Mr. Turner: I can get him here again.

(Testimony of James M. Morrison.)

Cross Examination

Q. (By Mr. Turner): Did that particular venture make money or lose money?

Mr. Crain: I object. He doesn't even remember what money was gotten.

The Court: Mr. Crain's question was directed to amounts. Now Mr. Turner's question is, if the witness knows, did they [75] make money or lose money on that particular venture; not how much or how little but just a general conclusion which he may or may not—

A. May I make a slight explanation, your Honor, on that?

The Court: Yes, go ahead.

A. It's a rather difficult situation for me to tell you how much money we took in because all vendor's bills, material bills, were paid directly by the joint venture. We were reimbursed for money we put out as payroll, supplies furnished from our own inventory, or equipment we had on the job, and frankly, your Honor, I don't remember what percentage we would have supplied against what we bought from outside concerns.

The Court: In other words, you wore two hats, the joint venture in dealing with vendors as they would with a third person—

A. That is correct.

The Court: And all you know is what money you got for furnishing equipment, supplies or labor.

Q. (By Mr. Turner): I still want to know do you know whether or not you are able to state the

(Testimony of James M. Morrison.)

joint venture made money or lost money in connection with Koster and Whyte?

A. It hasn't been completely closed out and I think it is nip and tuck. I think we practically broke even.

Mr. Crain: May I ask one or two other questions, if the court please? [76]

The Court: Yes.

Redirect Examination

Q. (By Mr. Crain): This also comes into the realm of conjecture. Can you tell us what your weekly payroll, prior to March 31, 1954, on an average was? A. Prior to March '54?

Q. A year ago last month.

A. That was while the second increment at the hospital was underway. Our weekly payroll was running 4 to \$5,000.

Q. Had it been running that for a period of months prior to that date?

A. No, it hadn't. That was due to the heavy hiring of labor on the hospital job.

Q. When did that hiring start?

A. In a small way about March of '53 and it actually got to real heavy hiring where we had a hundred or two hundred men about May, I would say.

Q. Of '53? A. Yes.

Q. So that from May '53 through March '54 your payroll would be running between 4 and \$5,000 a week?

(Testimony of James M. Morrison.)

A. With fluctuations and reaching a peak, I would say, in August and as we finished concrete work and heavy construction men were laid off.

Q. When you say you reached a peak of 4 to \$5,000, would that be the peak or higher than that?

A. I think on occasion it would go higher than that when considerable overtime was involved.

Q. Give me an idea as to what would be the entire payroll from May '53 to March '54?

A. That would be hard to say because there were many other jobs at the same time.

Q. Well, based on the figures you have given us, Mr. Morrison, for the ten-month period ending March 31, 1954, the gross payroll was \$64,000?

A. Ten months? I think that would be almost about right, probably.

Q. Even though your payroll for many months was running 4 to \$5,000?

A. Yes, it started with a little, built up to a peak and slid off again rapidly.

Q. How long a period of time was it at that peak? In other words, you said you had close to 200 men on a job. How long a period of time, did you have 200 men on the job?

A. Well, now, wait a minute. I am confused a little bit. We were only carrying half the payroll. Koster-Whyte was paying the other half.

Q. That was residence construction?

A. Yes. [78]

Q. That was completed about March '54, wasn't it?

A. Yes.

(Testimony of James M. Morrison.)

Q. You paid half?

A. We paid our employees; Koster-Whyte paid their employees.

Q. How many employees did you have on the job during that period of time?

A. It seems to me that our peak that we had at one time was 134.

Q. That was both on the hospital job and other construction?

A. That is the total. I remember that I was amazed at one time that we were carrying that many people.

Q. 134 men, you say? At that peak it would run about \$5,000 a week?

A. Between 4 and 5. I think during all that period of time—now this is pure conjecture—I would hate to say for sure—it would be 36 or 37 on an average, a week.

Q. For how long a period did the peak last?

A. Oh, I don't know, possibly on the outside during the peak period it was maybe four, maybe three months.

Q. Do you feel that the figure for labor, \$64,000 for the period of ten months would be your total labor, including the hospital?

The Court: What figure are we talking about? Have you referred to this figure?

Mr. Crain: \$64,000. [79]

A. I am not familiar with the statement you are talking about.

Mr. Crain: Oh, I am sorry; it's your statement.

(Testimony of James M. Morrison.)

The Court: We do not have anything in evidence.

A. Oh, yes, this is the one Mr. Miller made. I recognize this. Well, I think it is undoubtedly correct. I had no question of it at the time I looked it over.

Mr. Crain: I have no other questions, your Honor.

Mr. Turner: I have no questions, your Honor.

The Court: Thank you, Mr. Morrison.

Mr. Crain: We rest.

Mr. Turner: Your Honor, I will move to dismiss count—dismiss the second cause of action, that is the net profit, on the grounds there has been no evidence to support the fact that there was a net profit.

The Court: What about No. 3?

Mr. Turner: Well, No. 3, your Honor, certainly I think the contract itself is clear on the matter of return transportation, and I think also on the question of the automobile, Mr. Lerche's statement shows an agreement to use his car and supply it with tires, gas, etc. after the wreck of the Buick, so I move to dismiss the third cause of action also.

The Court: Mr. Crain, argument?

Mr. Crain: I don't think that the second cause of action should be dismissed as yet. I think that the court is well [80] aware that the plaintiff has not had access to the books of this company as promised, and I think that the plaintiff has shown that he has tried in good faith to have access to the

books as they were promised, but the situation being as it is, this company hasn't filed any tax returns locally for over two years, for a period over two years. Apparently they haven't filed any returns in the period for the past 16 or 17 months although they have a fiscal year ending in May, and I think the plaintiff should be allowed to have a reasonable time to examine the books rather than be given a period of time from Thursday afternoon over Easter week end.

The Court: You have rested.

Mr. Crain: I didn't want to go to trial because of the situation concerning these books and I was told if I did go to trial if there was any indication, I would be allowed to look at the books later.

Mr. Turner: If the court please, the plaintiff put Mr. Warashima on as his own witness.

Mr. Crain: The most important thing Mr. Warashima said was he had the books in Honolulu since November until he landed in Guam last Wednesday night at midnight.

The Court: Well, more than that—he testified that up into fiscal '53 there was a loss of \$156,000.

Mr. Crain: There has not been any tax returns filed on that figure. He said he would not file any return based on [81] those figures.

The Court: He said he would get that straightened out while he was here.

Mr. Turner: That tax return he testified was filed on '53, \$156,000 loss.

The Court: But not '54. He did not keep the books in fiscal '54.

Mr. Crain: I think it is manifestly unfair to say that—while I had Mr. Warashima on the stand how could we reconcile our thoughts on these books over this past week end so we could intelligently interrogate Mr. Warashima?

The Court: Mr. Turner's point is that he was not an adverse witness.

Mr. Crain: I don't think I have to pin a label on him as adverse.

The Court: Certainly, Mr. Crain, in the absence of any other testimony to the contrary.

Mr. Crain: The only testimony Mr. Warashima was able to give the court was that he was down here trying to find out what was in the books himself.

The Court: In '54 he wanted to check profit and loss. Your second cause of action alleges that a profit of \$81,730 was made. There is no evidence whatever to support that.

Mr. Crain: I was not permitted to prepare my case on that point. [82]

The Court: Mr. Crain, the court understood you to say that you had rested.

Mr. Crain: I did but I rested on the basis of statements that were made to me by the court that in the event it was shown that these books had not been available and that we had not been able to make a proper study of them, and if the court felt that anything could be gained by examining the books, that we would be allowed to do so.

The Court: Mr. Crain, there was no such reservation made at the time you rested nor does the

court have any basis for assuming, in the light of the testimony here, that the books would show anything different from the things that were given.

Mr. Crain: In the light of the testimony I don't think it was even shown that there was a set of books available.

The Court: Well, your witness testified that he had the journal.

Mr. Crain: Yes, and he had them in Honolulu, too, during the five months they were supposed to be here.

Mr. Turner: And he had them here this morning.

Mr. Crain: Fine—how in the world is the plaintiff to examine a set of books in the courtroom, covering a period of two years? We can't examine them in the courtroom, and that was not the intent as to what would happen when we had the pretrial conference in January.

Mr. Turner: If I may state, Mr. Warashima arrived here [83] Wednesday—

Mr. Crain: Last Wednesday night.

Mr. Turner: Yes, all right—I think you met with him on Thursday afternoon. You and I met with him on Saturday and as far as Mr. Warashima is concerned he had answered any questions your accountant had.

Mr. Crain: That is fine but the books were supposed to be available for several months; they were available, actually, several hours.

Mr. Turner: The original entries were up there

at all times, the paid vouchers and so forth—just the journal was missing.

Mr. Crain: How could we examine them without the journal?

Mr. Turner: If your Honor please, the plaintiff said he was ready; he called his witnesses and he rested his case.

Mr. Crain: I agree; that's exactly the way it happened.

The Court: Where do we have this question of return transportation involved?

Mr. Turner: It's in the third cause of action, your Honor.

Mr. Crain: It's in the third paragraph of the letter agreement.

Mr. Turner: Actually, under the contract——

The Court: Of course, there is no evidence before me as to any return or that there was any intention to return, or as to what the cost would have been had there been. [84]

Mr. Turner: On top of that it is if the company went out of business.

The Court: I realize that but I don't think the company could escape responsibility. At the time, so far as the plaintiff is concerned, the company went out of business when he ceased to be connected with it involuntarily, but if that were the problem—of course, my problem is that I have no evidence whatever as to any damage on that point. I have no evidence that there was any intention to return to the mainland. I have no evidence as to what it would cost for the return. In fact I have no evi-

dence as to the size of the family even—what was involved—so surely I have no basis on which to consider that. I agree with the defendant as to the automobile. Certainly the maintenance and repairs and furnishing of tires and oil and gas is good and proper for the use of the car unless there was an understanding to the contrary, because if the plaintiff expects to recover for the car he would have put in the required vouchers currently so it could be charged against the operating expenses of the business. As a proper operating expense I don't think he could wait until the thing was all over—"Here I did these things. You didn't pay me for them although I didn't ask for it or expect it at the time." The defendant's motion for the dismissal of plaintiff's second and third causes of action is granted for the reason that the plaintiff has shown no breach of contract as regards those items or any damage flowing therefrom. [85] Now the first cause of action.

JAMES M. MORRISON

previously called as an adverse witness by the plaintiff, was called as a witness by the defendant, and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Turner): Mr. Morrison, you previously testified that you came to Guam for Fisher Construction Company in March of 1953 and assumed active managership of the local operation?

A. That is correct.

(Testimony of James M. Morrison.)

Q. And did you have that position of manager from March, 1953 until May of 1954 when Mr. Lerche was discharged?

A. That is correct.

Q. Now during that period from March, 1953 until the end of May, 1954 what were Mr. Lerche's duties with the company?

A. When I first came over I put Mr. Lerche with the Fisher-Koster-Whyte joint venture preparing lists of materials to be purchased, various duties like that. Then we had him handling the small jobs that the company was doing. By small jobs I mean \$25,000, \$20,000 down. At one time or another I had him doing estimating.

Q. Do you remember any particular contracts that he estimated? A. Yes. [86]

Q. What were those contracts?

The Court: Now before Mr. Morrison continues—Mr. Morrison, he was employed, according to this letter, as administrator, was he, or when did he cease?

A. Well, your Honor, I thought that was a very nebulous term myself. His duties as administrator—well, it's rather difficult to explain—but frankly I think the title was a very poor one. His duties didn't correspond with that title and didn't at the time I took over.

The Court: In other words, he was employed as administrator but he never performed any duties as one? A. That is correct.

The Court: What you are testifying to now is

(Testimony of James M. Morrison.)

that he performed such duties as assigned by you?

A. Correct.

The Court: And he had nothing to do with the title of administrator? A. No.

Q. (By Mr. Turner): Do you remember what jobs he estimated specifically?

A. Well, I could name a few; I don't know whether I could name all of them.

Q. Name them.

A. Umatic School was the largest one he estimated for us.

Q. When was that job estimated? [87]

A. I think it was September but I am not—

Q. Of what year?

A. That would be September of '53, but I am not positive of that.

Q. Now did he do all of the estimating on that job or part of it?

A. He did all of it.

Q. And for what purpose was this estimate prepared? For bids? A. Yes, it was.

Q. Did you subsequently ascertain that there were any errors in the bid estimating?

A. Yes, the estimate that Mr. Lerche prepared—and this is memory again—I don't know the exact figures but this is substantially correct—was for \$131,000. Mr. Fisher went over the estimate and picked up a few items that were obviously omitted and brought the estimate up to 140 some odd dollars. After seeing that I went into it rather carefully in the short time available, and we actually

(Testimony of James M. Morrison.)

bid the job at \$158,000 and we were still \$5,000 under our closest competitor.

Q. When was that final bid submitted?

A. Mr. Turner, frankly I don't remember. I would have to check back. My memory is very hazy about that period of time.

Q. Was it in 1954 it was submitted?

A. No, it was submitted in the fall of '53. We actually [88] built it in '54.

Q. When did you start construction on the school?

A. I believe it was March 1954. It was originally scheduled for January then the government elected to do their own grading and that postponed it to March, I believe.

Q. Did you find any errors in Mr. Lerche's estimating on that job?

A. Yes, as I just pointed out, there were some extreme errors which would have made it extremely unprofitable if we had gone in on that figure.

Q. Do you remember what those errors were?

A. Yes, leaving out the equipment cost—that was one of the items we added in afterwards, and then by the same token we found out after we got the job under construction, various items of work simply weren't in the estimate.

Q. Such as what?

A. Well, I remember one specifically where he had in the estimate some \$3,000 for hardware that we ultimately paid \$7,600 for.

(Testimony of James M. Morrison.)

The Court: Do you remember when you bid that job?

A. I am sure it was September of '53, your Honor.

The Court: September of '53?

A. That is, approximately.

The Court: Now, Mr. Turner, do you have any right to go back of what you admitted here—that you increased Mr. Lerche's [89] salary from \$175 to \$200, I believe in February of '54?

Mr. Turner: Yes, I will tie this testimony in.

The Court: Now I don't see how you can go back of February '54 to try to show incompetency.

Mr. Turner: Right now, your Honor, this error of estimating on the Umatic School, as established, was obtained after February '54.

The Court: That isn't Mr. Morrison's testimony. His testimony is he bid the job in September 1953 and before they bid the job Mr. Fisher had gone over it and found numerous errors and Mr. Morrison had gone over it and increased it and they were still \$5,000 under the lowest bid.

A. That is correct but some of the things did not develop until after we got the thing underway.

The Court: Well, I think your testimony must be confined to that. I can't visualize you being in an equitable position to complain of an employee who was under contract to you and whose salary you voluntarily increased in February of '54—

Q. (By Mr. Turner): Let me ask you this question—

(Testimony of James M. Morrison.)

The Court: Though you weren't obligated by your contract to do so.

Q. (By Mr. Turner): Mr. Morrison, taking the date of February 1, 1954, as manager of this company did there come to your attention any errors in Mr. Lerche's estimating? A. Yes. [90]

Q. Or any failure to properly perform his duties that you assigned him? Will you tell the court.

A. That is correct.

Q. What errors were they?

Mr. Crain: I believe this is a leading question, if your Honor please.

Mr. Turner: Well, I don't have the answer to my question.

The Court: The witnesses so far, it seems to me, have been almost indiscriminately asked leading questions, so I don't see why he can't be asked. The question was "What errors were they?"

A. On Umatic School we actually started construction work in March and some of the errors and omissions that were in the original estimate didn't develop until we started to get the material for the job and found that some things had been estimated short and one of our prime concerns later on—it developed in the summer of '54 that these materials for the job had not been ordered. We had to fly, at rather heavy air freight cost, certain items that went into the job.

Q. What were they? Do you remember any of those?

A. Offhand I don't remember what they were,

(Testimony of James M. Morrison.)

Mr. Turner. I would have to refresh my memory on it. I know that we discovered very late in the game that certain items that were essential for the job just hadn't been ordered.

Q. Did you have any other complaints with reference to [91] Mr. Lerche's performance on the Umatic School job after February 1954?

A. One item I just remembered—something that had to be flown in. It was the astragals that go on the doors.

Mr. Crain: The what?

A. Astragals—a-s-t-r-a-g-a-l-s—the strip that goes between the doors, a weather strip between the doors to keep them from coming together.

Q. (By Mr. Turner): Did you have any other complaints of the way in which work was performed after February 1954?

A. The other job we had difficulty with was a very small job for the Coast Guard on Cocos Island in which all of the material was to have been purchased and assembled on the dock at Merizo ready to go over. Because it was such a small job you had to make one shipment out of it in order to make anything. As I remember it was pipe fittings, primarily, that weren't suitable for the job and also some galvanized iron spouts.

Q. Did that delay the job?

A. Yes, it did.

Q. In what way did it delay the job?

A. We had a crew all assembled ready to go. We had to disperse that crew and put them off on

(Testimony of James M. Morrison.)

something else until the necessary materials could be gotten in. I think we managed to get them locally, if I remember rightly, but at quite an additional cost. [92]

Q. Do you remember who was in charge of assembling materials on that job?

A. Mr. Lerche.

Q. And that was after February 1, 1954?

A. Yes, it was well along in the summer, it must have been, at least. In fact that was one of the straws that broke the camel's back really, that led up immediately to Mr. Lerche's being released. I don't know whether's it's ethical or not—let me ask, Mr. Turner, could I describe this in my own words without your asking questions?

Q. Yes.

A. When I first came over here Mr. Lerche was working for the company. I tried using him in various capacities because I had great hopes that he would be a satisfactory employee and one who would make money for us. He certainly seemed to have ability if he would just show it. In late '53 or early '54, I am not just sure when it was, he seemed to show signs of really doing a job for us. At that time we raised his salary and for a time everything went beautifully then we began discovering these errors. We weren't satisfied with the work he was doing. It was very difficult to find Mr. Lerche on any of our jobs. What he was doing we don't know, but Mr. Fisher and I discussed it and decided that

(Testimony of James M. Morrison.)

the time had come when Mr. Lerche was of no value to us and he wasn't earning money for us.

Q. Was that why he was discharged? [93]

A. Yes, if a man isn't earning money we can't keep him on the payroll.

Q. Do you remember Tom Curran's house?

A. That happened before I came. I am familiar with it.

Q. Do you remember the Atkins-Kroll job?

A. Yes.

Q. Were there any delays on that job?

A. Yes, there were delays in getting material. The job dragged out rather longer than it should have. The client was rather unhappy with the progress of the work.

Mr. Turner: Your witness.

Cross Examination

Q. (By Mr. Crain): You have stated that the reason that Mr. Lerche was discharged was that he was no longer making money for you?

A. That is correct.

Q. Is the inference correct then that at one time he was making money for the company?

A. There was a period of a few months, a period of three or four months when it appeared that he was.

Q. How could you tell, Mr. Morrison?

A. It's a rather nebulous thing in this business, but you know when a job is going well, Mr. Crain.

Q. On this Cocos Island job that you testified

(Testimony of James M. Morrison.)

about isn't it a fact that every day you had boats going from the mainland [94] to Cocos Island? Weren't there personnel going back and forth?

A. That is correct.

Q. And isn't it a fact that within a few days all the material that wasn't available at first was made available and carried over on the very same boats that the crews were going over in every day?

A. I believe we did.

Q. And Mr. Lerche procured that material?

A. Yes, he did.

Q. And the fact that some of the material went over two or three days later didn't slow the job down, did it? A. Yes, it did.

Q. How could it?

A. Because some of the things that were missing were some of the things that were needed.

Q. In the first two or three days?

A. Yes, in view of the fact that it was a very small job, the thing to do to make money is to put the things in there, do the job and get out.

Q. Wasn't what you inferred was that there was a great delay?

The Court: I didn't so understand, Mr. Crain. There was a temporary displacement of workers because of the lack of the material immediately but the principal inference was that the difference was that you had to buy local materials at greatly [95] increased cost.

Mr. Crain: I didn't get that inference.

A. Yes, that is right and on a small job like that

(Testimony of James M. Morrison.)

you just can't stand it. Every \$5.00 item means something.

Q. (By Mr. Crain): Isn't it a fact that the material missing was two items, plumbing fittings and iron spouts?

A. Those are the two things I remember.

Q. Now the plumbing was coming from Mr. Cook?

A. That I couldn't answer either because I don't know.

Q. You don't know then that it increased the cost of the job?

A. Yes, I can't prove it to you from the books, but I know any time a job doesn't move quickly it isn't making money.

Q. You were saying that the cost was more because the materials had to be procured locally. What I am saying is that they would have been procured locally anyway.

A. No, we buy from local vendors but they bring it in on special order for us from the mainland.

Q. You haven't always done that, have you?

A. We have except if we haven't the time to.

Q. Isn't it a fact over a period of months, many many months, you ordered locally and in small quantities from local material suppliers?

A. Yes, in many jobs because that is what the client wants; he wants it now. [96]

Q. Now what were the delays in receiving materials on the Atkins-Kroll job?

(Testimony of James M. Morrison.)

A. Specifically I don't remember; it's been some time back and I just don't recall.

Q. Who complained about the delay?

A. Mr. Van Sickland was manager at that time.

Q. He complained?

A. That is right.

Q. He is no longer here, is he?

A. No, he isn't.

Q. And you previously testified that Mr. Lerche made an estimate for the Umatic job in September 1953?

A. I think that was the date; I am not sure.

Q. You stated Mr. Fisher made a subsequent reestimate of that job and revised it upward?

A. Yes.

Q. How long after Mr. Lerche's estimate did Mr. Fisher make his estimate?

A. Oh, the day the bid was submitted or possibly the day before. As I remember the circumstances—I won't swear to my memory—I was estimating another job. Ordinarily I would do this job myself but I asked Mr. Lerche to do this job and usually an estimate isn't finished until the day before the bid is submitted. Mr. Fisher went over it and picked up some errors, enough errors to make me suspicious, so I went over it further. [97] He was only looking for one specific thing. When he found that, it seemed necessary to go into the whole thing.

Q. Was that the only job Mr. Lerche estimated for you?

(Testimony of James M. Morrison.)

A. No, he estimated many jobs. This was the biggest thing.

Q. Who else estimates jobs? A. I do.

Q. From the time you arrived here?

A. Yes.

Q. Who estimated jobs from September 29, 1952 until the time you took over in 1953? Would that have been Mr. Haley?

A. I am not too sure about things that happened prior to my time. I think Mr. Haley might have had a part in it. I think most were estimated by Honolulu.

Q. All right, some were estimated in Honolulu, some by Mr. Haley or Mr. Lerche?

A. None were estimated in Honolulu after I came.

Q. Did Mr. Fisher ever estimate any of these jobs? A. None on Guam.

Q. What about the major jobs like the TB wing at the hospital?

A. Those are my own estimates.

Q. What about the nursing home and housing at Guam Memorial?

A. Those are my own.

Q. On a dollar basis of the amount of business that the company estimated between the time you came here, March of '53 [98] and May of '54 would you say that you and Mr. Lerche each estimated about half?

A. Oh, no, because most of Mr. Lerche's were small jobs.

(Testimony of James M. Morrison.)

Q. Now you said Mr. Lerche made some obvious errors on the Umatic School job?

A. That is correct.

Q. Did I understand you to say that the Umatic School job broke even, lost money or made money?

A. The Umatic School job just about broke even.

Q. In other words, if the company lost better than \$200,000 in two years there was some estimating around here that was haywire besides Mr. Lerche's?

A. That is quite possible.

Q. In other words, this Umatic School job is not a glaring error in view of the overall operation of the company in Guam?

A. Yes, it is.

Q. Because somewhere the jobs didn't break even——

A. That is correct.

Q. And the major portion were jobs that Mr. Lerch didn't touch, isn't that correct?

A. That is correct.

Q. Is it correct that the company in the two years, '52 to '54, lost money?

A. I don't know the exact figures. I don't know the exact figures; it was 8 or \$90,000 in one year and \$45,000 in the [99] next. That, I might say, is what you would normally expect in moving into a strange territory. A great deal of the loss is due to becoming established.

Q. Were you in Fisher Construction Company in Honolulu prior to coming to Guam?

A. No, I had my own business there.

Q. Would you say that Fisher Construction

(Testimony of James M. Morrison.)

Company going into business in June of 1950 in Hawaii would have gone through the same growing pains that happened here?

A. Yes, almost any new company would have the same period.

Q. But they got over that before?

A. That is correct.

Q. Is the Company making money in Guam now?

A. We hope so.

Q. But you don't know?

A. No, frankly as of the moment until Mr. Warashima finishes the audit he is working on now. I don't know exactly where we stand. We are not growing phenomenally wealthy, but each year is showing an improvement.

Q. You think maybe this year you will break even? A. Yep.

Mr. Crain: I have no further questions, your Honor.

Mr. Turner: I have no further questions.

Examination by the Court

Q. I just have one question, Mr. Morrison, as regards your [100] inability to find Mr. Lerche on the job—did he have an office?

A. Oh, yes, he worked out of our office.

Q. And that office is located where?

A. In Tamuning.

Q. And you say that you had difficulty in finding him on the jobs? A. That is right.

Q. And what jobs were those?

(Testimony of James M. Morrison.)

A. At the particular time I am thinking about Mr. Lerche had three jobs under his jurisdiction, the Atkins-Kroll job, Cocos Island job, and Umatie School.

Q. And what explanation did he give you when you asked him where he had been?

A. Well, he was always at the other place. When I was at No. 1, he was always at No. 2, etc.

Q. Which was possible.

A. Possible, yes, but extremely unlikely.

Recross Examination

Q. (By Mr. Crain): Are the gross receipts taxes of the company paid current up to this time?

A. They are paid currently and have been.

Q. Are copies of gross receipts returns available?

A. Well, I presume the territory has them on file.

Q. Doesn't the company keep copies? [101]

A. Oh, yes, certainly we do.

Q. You heard the testimony of Mr. Warashima that for the year of '54 there was a reserve gross receipts tax of \$1,900 as against a gross income of \$304,000?

A. That reserve is a bookkeeping entry. It is set up out of each payment that comes in. Now actually we pay our gross receipts tax monthly, and there is no actual cash reserve for it. It is charged against each job when we receive payment.

(Testimony of James M. Morrison.)

Q. You don't carry it on your books as tax that has been paid? A. Oh, yes, certainly.

Q. Well, for the year ending May 31, 1954 you show taxes and licenses paid of \$1,941 against a gross income of \$304,000. That would not indicate a payment of gross receipts taxes?

A. There are several things that enter into that. No. 1, certain jobs are exempt from the payment.

Q. What jobs are those?

A. Any Navy work. The Navy refuses to pay taxes. No. 2, all of the money that we got, that we received as income from either of the joint ventures, we did not pay tax on. The tax was paid by the joint venture. We were simply being reimbursed for money we put out. That, I might say, was under a ruling from the Attorney General.

Q. How much did you have in the way of Navy jobs in '54?

The Court: I don't know that these questions are germane [102] to action No. 1.

Mr. Turner: Mr. Morrison just wanted it clear for the record they have been paying their tax.

Mr. Crain: Mr. Morrison brought it up they had paid them. I was told they hadn't.

The Court: The Government of Guam claims gross receipts taxes after 1953.

Mr. Turner: After one date when they changed the statute.

The Court: After July 1953 where the contract is with the government, it is on a cost-plus basis, why the government questions whether the gross

receipts are properly chargeable against the contracts—the gross receipts tax.

Mr. Crain: No, that is not my understanding. They have been paying gross receipts tax since 1950, the two major contractors on their cost-plus contracts.

A. By a very strange quirk the Air Force allows payment of taxes to the Government of Guam while the Navy does not, your Honor. All I wanted clear for the record was the fact we had paid our taxes.

The Court: That is very welcome news.

Mr. Turner: That is all taxes.

Mr. Crain: I am very glad you remembered that, Mr. Morrison.

Mr. Turner: I have a couple of intermediate witnesses, if you don't mind, who have been waiting for some time. I will call [103] them out of order. Mr. Bogovich.

PAUL BOGOVICH

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and address for the record.

A. Paul Bogovich, Surf Club, Asan, Guam.

Q. Are you acquainted with Mr. Lerche who was formerly with Fisher Construction Company?

A. Yes.

Q. Did you ever have occasion to deliver Mr.

(Testimony of Paul Bogovich.)

Lerche any money or any materials or anything else?

A. The only money transaction between Mr. Lerche and Surf Club was aluminum windows which was purchased in San Diego, California, and they were delivered in Guam in Mr. Lerche's name, care of Fisher Construction.

Mr. Turner: That is all. If the court please, the pretrial order shows that Mr. Bogovich is going to testify that the plaintiff's reputation in the community was bad and that is all. You want to raise that objection?

Mr. Crain: Well, I think you are going a little beyond that.

Mr. Turner: I am calling him as a rebuttal witness to Mr. Lerche's testimony. [104]

Mr. Crain: I thought you were putting on your own case.

Mr. Turner: I am but I can bring out rebuttal testimony.

Q. (By Mr. Turner): How did the windows come to Guam?

A. The windows came into Guam at the Commercial Port and was picked up by Pacific Import and delivered to Surf Club.

Q. And when did that purchase take place?

A. To be truthful I can't tell you exactly the date at the present time. Mr. McDonald's got the invoice and papers and I couldn't find them so I can't recall.

Q. Do you remember what year it was?

(Testimony of Paul Bogovich.)

A. Last year.

Q. 1954? A. Yea.

Q. Do you remember whether it was the first half or last half?

A. It must have been the first half.

Q. When did you deliver the money to Mr. Lerche? How long before the windows came?

A. Well, the company would not have sent the windows out unless the money was sent to San Diego.

Q. Of your knowledge you gave the money to Mr. Lerche to pay for the windows?

A. Yes.

Q. Did he send the money on as you instructed him to? A. Yes. [105]

Q. And that was in the first half of 1954?

A. Yes.

Mr. Turner: That is all. Your witness.

Cross Examination

Q. (By Mr. Crain): Do you recall, Paul, whether you paid for that by check or cash?

A. That's something I can't exactly state now because Mr. McDonald, as I stated before, has the books and he is located in the neighborhood here but he is not in. I can't get hold of him. The transaction amounted to 900 some odd dollars, \$950. I received my merchandise; there is no question about that.

Q. You haven't been billed for it again?

A. No, I wasn't billed a second time, no.

(Testimony of Paul Bogovich.)

Q. Now at or about the time, Paul, this window order was made, wasn't Fisher Construction Company estimating or had made a tentative contract to do certain remodeling in the Surf Club?

A. Well, there was nothing on paper. There was some verbal talk with Mr. Lerche, not with Mr. Fisher. I didn't discuss anything with Mr. Fisher except that when the windows would arrive on Guam that Mr. Lerche would install them for me, of course. Mr. Lerche represented Mr. Fisher at that time.

Q. It was just a conversation?

A. Just a conversation; nothing in writing. In fact I never discussed it with Mr. Fisher. [106]

Q. Well, to your knowledge, Mr. Fisher was off the island when this work was going on at Surf Club, wasn't he?

A. Well, he was on the island when some of the work was going on at Surf Club, but I never went into details with Mr. Fisher.

Q. The company did work on the Surf Club after the 1953 typhoon, did they not?

A. Yes.

Q. Was some of that work for your insurance carrier and some for you?

A. Yea.

Q. It is a fact that Mr. Fisher and his organization are good customers at Surf Club?

A. Yes, they come down to Surf Club.

The Court: Do I understand, Mr. Bogovich, at

(Testimony of Paul Bogovich.)

the time you did say to him that Mr. Lerche would put them in after they got there?

A. Yes, there was a tentative talk in that respect.

Mr. Turner: Just one question.

Redirect Examination

Q. (By Mr. Turner): Hadn't Mr. Fisher told you he wouldn't invest any more money in that building or do any work for you?

A. That is correct.

Q. Was that prior to the work that was done?

A. Well, Mr. Fisher made a statement to me that he preferred I build a new building rather than remodel the Surf Club.

Q. You don't recall whether it was at the time of this work or afterwards?

A. That I can't recall whether it was at that time or after that.

The Court: Thank you, Mr. Bogovich.

CARLINA ROSARIO

was called as a witness by the defendant, was duly sworn and testified as follows:

The Court: Who is this witness?

Mr. Turner: This is Mrs. Rosario, your Honor.

The Court: Now just sit down a moment, Mrs. Rosario. What bearing does her testimony have upon the question of Mr. Lerche's standing in the community?

Mr. Turner: Well, I wasn't calling her for that

(Testimony of Carlina Rosario.)

purpose, your Honor. I was calling her as rebuttal to his direct examination.

The Court: Mr. Turner, you haven't even brought out yet there was any communication to Mr. Morrison or to the Fisher Construction Company, any complaint or anything else that Mr. Lerche was not paying his bills.

Mr. Turner: I intend to.

The Court: Mr. Morrison said the reason he discharged him was because he wasn't making money for the company. [108]

Mr. Turner: I intended—I am calling these people because they have been sitting out there all day. I am calling them out of order. I appreciate your point. It is just rebuttal on his testimony this morning.

The Court: Of course, you brought out on cross-examination so far as Mrs. Rosario was concerned there was a dispute over the lease and he hadn't paid up on his lease and that now everything was harmonious.

Mr. Turner: I appreciate that, your Honor.

The Court: My point is that I don't see having a dispute over a lease on Guam necessarily reflects on one's credit standing in the community.

Mr. Turner: No, he said he paid his rent up until the time this dispute arose and this is rebuttal testimony. I am offering to impeach his testimony.

The Court: What bearing does it have unless Mrs. Rosario saw fit to communicate with the Fish-

(Testimony of Carlina Rosario.)

er's and ask him to pay his rent or something of that kind.

Mr. Turner: Merely to impeach his testimony, your Honor.

The Court: Well, if you want the testimony in the record, I certainly can't prevent it but Mrs. Rosario has indicated she doesn't understand the language.

Mr. Turner: Well, I will excuse her if you don't think it has any merit, your Honor.

The Court: Well, I am not trying your case and I certainly [109] can't deny you the right to put on your case any way that you see fit unless objected to by the other side, but I am somewhat familiar with that dispute since I tried the action in this court, and the dispute started with one of the most ambiguous lease agreements that I have seen in some time, and finally it was resolved by a free and frank admission on Mr. Lerche's part that he owed the rent up until that time.

Mr. Turner: I won't bother questioning her, your Honor.

The Court: And the parties stipulated in open court that he owed the rent all up until the time of renewal.

Mr. Turner: All right, your Honor, I won't call her as a witness.

The Court: Yes, I don't think it will be helpful to us here. You may be excused.

PAUL BITTING

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and place of residence.

A. Paul Bitting, Tamuning, Guam.

Q. By whom are you employed?

A. By Fisher Construction.

Q. In what capacity are you employed?

A. Master mechanic. [110]

Q. How long have you been an employee of Fisher Construction in Guam?

A. In Guam about a year and six months.

Q. When did you first come to work?

A. It was October 23, 1953.

Q. What has been your job assignment as a master mechanic with Fisher?

A. I take care and charge of all the equipment, the operator's materials that is used on the jobs, charging them out and receiving them back from the jobs on completion.

Q. Did you ever have any other position with the company or any other assignment with the company here on Guam?

A. Well, now I am doing some outside work, some pipeline work for them.

Q. Did you ever have any connection with the material warehouse, issuing materials?

A. Yes, sir.

Q. What was that job?

(Testimony of Paul Bitting.)

A. Issuing out all tools, lumber, cement and whatever was pertinent to the construction.

Q. Do you know Mr. C. W. Lerche?

A. Yes, sir.

Q. Did you have occasion to observe Mr. Lerche on the Umatic School job at any time?

A. Yes, sir. [111]

Q. Would you state the circumstances under which you observed him on the Umatic School job?

A. Well, once I observed Mr. Lerche sitting in an automobile with four men from BPM. They were at that time consuming beer.

Q. This was during the——

A. During the process of the job while they were pouring concrete.

Q. Where did you observe Mr. Lerche?

A. Down on the main road in Umatic.

Q. In the vicinity of the job?

A. The job was up on the hill, I imagine about a hundred yards distant.

Q. Now in connection with being in charge of heavy equipment for the company did you, after February, 1954, have any occasion to object to Mr. Lerche in connection with the equipment utilized by him?

A. Yes, I questioned him on the issuance and use of equipment.

Q. Will you please explain the question that was raised.

A. Rephrase that and ask that again.

(Testimony of Paul Bitting.)

Q. Did you have occasion to object to the manner in which any equipment was handled under Mr. Lerche's control?

A. No, because the operators were actually working for me.

Q. Did you have any occasion to object to Mr. Lerche's performance after February 1, 1954 when you were in charge of [112] the materials warehouse?

A. Yes, the question was brought up quite a few times when the jobs he had were completed that no material was ever returned, and it seemed that every other job has material returned to the warehouse and they would be issued a slip on what they had returned.

Q. Did you make these objections known to either Mr. Morrison or Mr. Fisher?

A. I told Mr. Fisher this.

Mr. Turner: That is all the questions I have.

Cross Examination

Q. (By Mr. Crain): You say that was after February 1, 1954?

A. Yes, sir.

Q. How many jobs were involved?

A. Well, when I arrived here he was working on Atkins-Kroll.

Q. We are talking about after February 1, '54.

A. The Umatic job was the last job that I remember him on.

Q. Isn't it a fact that he wasn't on the Umatic job at its completion?

(Testimony of Paul Bitting.)

A. That is right.

Q. Then he wouldn't have had anything to do with materials coming back from the job after it was over, would he?

A. Material was taken out a couple of times that were not [113] required for the job.

Q. That wasn't what you testified to on direct. You indicated he did not return materials from the job, excess materials? A. That is right.

Q. I ask you after February 1st when you took over the warehouse name the jobs he didn't return the materials from? The only one you named is Umatic School and he wasn't—it wasn't completed when he left the company.

A. The Atkins-Kroll job has passed my mind. It would be Atkins-Kroll job and Bilmar Market job.

Q. You say no material came back from either of those jobs? A. That is right.

Q. What material should have come back?

A. Well, every job has material that is returned, such as plywood, two by four's. If they used roofing they never take out the correct sheets. Everybody else brings back partial pieces or whole pieces.

Q. When was the Atkins-Kroll job completed?

A. I couldn't give you a correct date on it.

Q. But you remember no material came back?

A. That is right.

Q. When was the Bilmar Market job completed?

A. I don't know the dates.

Q. How much material went out of the warehouse for the [114] Atkins-Kroll job?

(Testimony of Paul Bitting.)

A. I would have to consult the tickets.

Q. Did the material for this particular job all go out at one time? A. No, sir.

Q. It went over a long period of time in small amounts? A. That is right.

Q. What, specifically, do you feel was not returned to the warehouse?

A. Well, there is no item specifically but there should have been some lumber that was used for form lumber, for sheet roofing, nails.

Q. I believe you testified you didn't tell Mr. Morrison but you went directly to Mr. Fisher with it? A. That is right.

Q. Was Mr. Fisher here at the completion of both those jobs? A. I don't remember.

Q. But you by-passed Mr. Morrison completely, is that right? A. Yes, sir.

Q. And Mr. Lerche would not have been involved in a failure to return material from the Umatic School job, is that right?

A. Well, he did not complete the job.

Q. That answers the question, doesn't it? You are still an employee of Fisher Construction Company, is that right? [115] A. That is right.

Mr. Crain: I have no other questions.

The Court: You may be excused. The court will take a ten-minute recess.

(The court recessed at 2:55 p.m. and reconvened at 3:10 p.m., April 11, 1955.)

The Court: Call your next witness.

Mr. Turner: Mr. Fisher will be the next witness.

A. M. FISHER

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and address for the record.

A. A. M. Fisher.

Q. Address?

A. I don't know whether it's Tamuning, Guam, or Honolulu, Hawaii—both places.

Q. Do you have any connection with Fisher Construction Company, Ltd.?

A. Yes, I am president and general manager.

Q. And have you had those positions since the company was first organized? A. Yes.

Q. Have you had those positions since the company was first [116] organized?

A. That is correct.

Q. When was the company first organized?

A. About May 1, 1950.

Q. There has been introduced by stipulation as an exhibit an agreement dated September 29, 1952 between Mr. Lerche and your company. Would you look at that and say whether that constitutes the agreement and whether you signed it?

A. Yes.

Q. You actually hired Mr. Lerche then?

A. That is right.

Q. The agreement states that he will be employed in the capacity of administrator. Will you please state what that capacity was?

(Testimony of A. M. Fisher.)

A. Office manager.

Q. As office manager what were Mr. Lerche's duties?

A. Well, primarily to see that statements got out, to see that the books were in some sort of readable and understandable condition and to see that the Honolulu office got the information necessary to understand what was going on on Guam.

Q. Now when Mr. Lerche was first employed who was he under? A. He was under Haley.

Q. What was Haley at that time?

A. Haley was Guam manager.

Q. And was Mr. Haley replaced at a subsequent date? [117]

A. Replaced by Mr. Morrison.

Q. When did that replacement take place?

A. About March of 1953.

Q. Now after March of 1953 was Mr. Lerche under any particular individual here on Guam?

A. He was under Mr. Morrison.

Q. Did you discharge Mr. Lerche?

A. Yes.

Q. Referring to after February 1, 1954 will you state what happened to cause you to discharge Mr. Lerche?

A. May I be permitted to go back of February 1 a month or two?

Q. You may if it bears on your decision of February 1, 1954 to discharge Mr. Lerche.

A. Well, I had been horribly disappointed in Mr. Lerche and then he seemed to have an upsurge

(Testimony of A. M. Fisher.)

after the 1st. I was able to find him when I wanted him, which I had never been able to do before, so I thought I would keep him and give him the courage and ambition to keep going so I gave him a raise, but it wasn't three or four weeks until deficiencies showed up more than there was before.

Q. What were they?

A. No. 1, he wasn't on the job; No. 2, on the Cocos Island job he had distinct orders, verbally, under no circumstances was he to start until the material was here. None of it was to [118] be bought locally. Then we found that Umatic School—his take-off was faulty. He had prices in there that didn't begin to cover the stuff that was supposed to be covered and we were faced with the necessity of fighting to keep from losing money. Those things don't show up until you actually get going. We found out on little jobs like the Bilmar job we lost \$1,100 worth. It doesn't seem possible you would lose. I said under no circumstances would we do any work on Mr. Bogovich's building, and when Lerche bought the window sash for him he did it contrary to my orders, and we either have an organization and a head to it or we don't run it.

Q. In regards to Cocos Island job was Mr. Lerche in charge of assembling material for that job?

A. Yes, he had three months time in which to assemble it.

Q. What were the shortages?

A. The main one was a valve which he over-

(Testimony of A. M. Fisher.)

looked completely and it cost us \$150 by air to get it here.

Q. That was exclusive of the cost of the valve?

A. Yes, may I explain—the Cocos Island job we tried to work it in with the Umatic School job. It was worked in with the TB wing because of equipment so we don't run into the Umatic job and because this little item over here was neglected, instead of doing the job in a week the equipment and men had to remain there longer and the superintendent at Umatic School was kept on there two and a half weeks longer. [119]

Q. That was Cocos Island?

A. Which in turn reflected back on Umatic School which in turn reflected back on the TB wing.

Q. Now with reference to Umatic School could you specify some of the shortages?

A. No. 1, door astragals which fit between two doors. Those are quarter-inch steel. There are a certain number of doors. All you have to do is count the number of doors and put down the number of astragals required. We found he had less than half enough. Those things had to be ordered from Honolulu and shipped air express and inasmuch as they weighed 7 pounds per lineal foot, it was very very expensive.

Q. Now Mr. Lerche estimated the Umatic School job. You went over it and Mr. Morrison subsequently went over it. Would those errors that Mr. Lerche made normally be caught in subsequent checks?

(Testimony of A. M. Fisher.)

A. I caught them in about five minutes.

Q. All of the errors?

A. Mr. Morrison and I were pretty busy. We were supposed to hand in the Umatic estimate the following day. I took a fast look and I uncovered so many errors I turned around to Mr. Morrison and said "You'd better give this a good look." Prices for labor and concrete—how much form work is there—when you have been in the game a long time you get those answers very quickly—how much equipment in that entire job. He had [120] rental on one compressor, two months, and all the equipment we needed was crane, front end loading, two 4½-yard mixers and an extra truck, man-haul truck, and the total amount of equipment he had in there was \$500.

Q. How much equipment was required?

A. Well, I think our rental plus fuel and oil probably ran to about 16 or \$17,000 for that job.

Q. You don't feel that all of those errors he made could have been caught?

A. Well, most of them could have been caught. For instance, on the hardware we didn't have time overnight to go out and get a new price and he didn't check to see whether he had all the hardware or not. Actually, on the bid he had 41 or \$4200 and that didn't include all the hardware.

Q. Do you remember how much the hardware was? A. \$7,200.

Q. And your estimate called for \$4,200?

(Testimony of A. M. Fisher.)

A. That is right, he left out half of the ornamental iron work.

Q. Now with reference to Thomas Curran do you remember whether the company did that job?

A. Yes.

Q. Did you, after February 1, have brought to your attention any errors in that job?

A. On that job a certain amount was paid in cash and [121] the balance to be paid at the rate of \$50 per month. I came over at one time and was looking at the accounts receivable and found they had paid nothing for about eight months so I wrote Mr. Curran a letter. First I checked with Mr. Morrison to find out if everything was OK and I was told everything was. I got a letter in response which brought me up to their house and I was horribly ashamed of what I saw.

Q. Could you tell us what you saw?

A. Would you like to have me read this? That is the letter I got back after I wrote them. I think it's dated March 24.

Mr. Turner: Do you have any objection?

Mr. Crain: No.

Mr. Turner: Your Honor, may this be admitted as Defendant's Exhibit 1, the first one.

The Court: Exhibit A.

(Testimony of A. M. Fisher.)

DEFENDANT'S EXHIBIT A

Mr. A. M. Fisher Agana, Guam, March 16, 1954
Fisher Construction Co., Ltd.
P.O. Box 309, Agana, Guam.

Dear Mr. Fisher:

I am in receipt of your letter dated March 12, 1954. I am happy to have this communication from you, for I feel that at long last justice will be done my claim.

About the middle of last year, I wrote c/o Mr. Morrison, and brought to his attention the unfinished work on my house. This missive was the outgrowth of many fruitless months, during which time every effort was made by me to have the work finished on my house. Realizing that it was a hopeless situation, I then wrote to Mr. Morrison and informed him that unless the work was finished no more payments would be forth coming. Shortly after, I had a personal conversation with Mr. Morrison, and he assured me that the matter would be taken care of. I am still waiting. And so your letter. I can well appreciate your position, as it does appear as if I am "taking unfair advantage" of your kindness in granting me this consideration.

To be specific: The levers in the bathroom were installed, however, the wood frames have never been painted. Due to a mistake, the casing around the door had to be removed, after the paint was applied. The casing was refitted, and never retouched. As a

(Testimony of A. M. Fisher.)

result it was left dirty, and the putty fully exposed, in all creating an unpleasant appearance.

The front porch, where it was joined to the original house, has a severe leak. Also the porch that runs the full length of the house is in and has been in poor condition. The 1x6 lumber used for siding is one mass of jagged cracks. The putty has cracked and in all it is most unsightly. It does not speak well for your Company when visitors ask who did the work.

The back porch, also has a bad leak. On the outside the gutters were never finished, and over the front entrance there is a bad leak. Also the down spout has fallen down.

The quality of the workmanship in general is poor, considering that a large and reputed firm construction was responsible. I just do not to tell people who worked on my house.

I would sincerely appreciate if you would personally inspect this work, for thus we can come to an amicable understanding.

Very truly yours,

/s/ Thomas Henry Curran

Mr. Turner: Yes.

Q. (By Mr. Turner): Now you say you received that letter in March?

A. That is right.

Q. About the 24th. Did you call upon Mr. Curran then?

(Testimony of A. M. Fisher.)

A. I called on Lerche first and he said it was all finished.

Q. Now this was in March 1954?

A. That is right. [122]

Q. When you had this conversation with Mr. Lerche? A. That is right.

Q. Did you thereafter look at this residence?

A. Went up the same day I got the letter and found that everything he had in that letter was true.

Q. Do you remember specifically what work had not been accomplished?

A. Well, none of the molding or baseboard in the new room, the gutter and down spouts were not in, the entrance hallway was not complete, and I would say that the job probably in its total was only 75 percent complete that we were supposed to have done.

Q. Do you remember the total amount of that job? A. I think about \$3,500.

Q. Did the company do another job for Atkins-Kroll, Guam, Ltd.? A. Yes.

Q. What was that job?

A. We converted a shop building into a store building or warehouse, rather, a warehouse building into a storeroom and office.

Q. Do you remember the period over which the work was done?

A. Well, it was done in the fall of '53. Presumably it was finished about the first of the year, '54.

Q. Did you after February 1, 1954 have your attention called to that particular job? [123]

(Testimony of A. M. Fisher.)

A. In two ways, one was that I wanted to know why we couldn't square our account with Atkins-Kroll for the building. No. 2, the then manager, Jim Van Sickland, called me up and asked me why we couldn't finish the job, why we couldn't correct the conditions there.

Q. Was the job completed?

A. It wasn't completed satisfactorily. I wouldn't have paid it in their place.

Q. Do you remember what wasn't completed?

A. Well, one thing, defects in the beams over the entrance. Some of the plywood had never been securely nailed. As far as I am concerned it was strictly a hash job.

Q. After you had this conversation with Mr. Van Sickland did you discuss the job with Mr. Lerche? A. Yes, we got all business.

Q. What do you mean?

A. Well, they had taken out one post. In view of the fact we had designed the job then it was up to us to strengthen the beams to take care of the absence of one post. Mr. Lerche designed the job himself.

Q. Did you have to complete the job?

A. Oh, yes, we completed the job. The client was entitled to it.

Q. Did the company sustain any additional expense by having to move back in to complete the job? [124]

A. You always do when you move back.

Q. Did you have any other aspects of Mr.

(Testimony of A. M. Fisher.)

Lerche's work after February 1, 1954 which dissatisfied you?

A. I couldn't find anything which satisfied me because all these things kept piling up at one time—things that had been hidden from me.

Q. Why did you discharge Mr. Lerche?

A. Because the sum total of what he did indicated that there wasn't any sense in hanging on to him any longer. We couldn't build him up.

Q. Did you personally give Mr. Lerche notice of his discharge? A. Yes.

Q. Did Mr. Lerche after May 24, 1954 make any claims against the company for salary?

A. No.

Q. No claims? A. Until the suit.

Q. At the time Mr. Lerche was discharged did he make any claim or contention that he was entitled to salary? A. No.

Mr. Turner: Your witness.

Cross Examination

Q. (By Mr. Crain): When did your company take the contract on the Curran house? [125]

A. '52, I believe.

Q. When was the job supposed to have been completed?

A. Oh, I would say by the first of the year '53 or before.

Q. I believe you said it was a \$3,500 job. It wouldn't take long, would it?

A. No.

(Testimony of A. M. Fisher.)

Q. Did Mr. Lerche have charge of that job?

A. He had charge of all small jobs. He had charge of all jobs at that time except Adelupe School.

Q. When did he have charge of small jobs?

A. When we found out after about 90 days that he wasn't any use in the office. It was turned over to him. Mr. Jules started it and it was turned over to him by myself.

Q. About what time?

A. I would say somewhere around October or November.

Q. But you just said he spent 90 days in the office?

A. That is right, most of 90 days in the office.

Q. That would have been until the first of January.

A. We will vary that a little.

Q. The letter that has been introduced in evidence here spoke of many complaints being made by Mr. Curran to Mr. Morrison. The letter didn't mention Mr. Lerche.

A. Well, Mr. Morrison could only go to Lerche for his information.

Q. Isn't it strange when Mr. Morrison was on the witness [126] stand he couldn't testify concerning this Curran job?

A. I don't think he was asked about the Curran job. As I remember his testimony, he wasn't asked about the Curran job.

Q. That is your answer to that question?

(Testimony of A. M. Fisher.)

A. At least if he did I didn't hear it so I assume he wasn't asked.

Q. If he stated during his testimony that he didn't know anything about the Curran job, he would be in error in view of the fact he had been approached many times, is that right?

A. Yes, if, when and how.

Q. And I believe you testified Mr. Lerche was under your man, Mr. Tom Haley, until Haley was replaced by Morrison? A. That is right.

Q. Haley remained on your payroll some time after that, did he not?

A. I would say about six months.

Q. He was discharged?

A. That is right.

Q. Why was he discharged?

A. Well, he was an alcoholic, I would say.

Q. During the additional six months he stayed on after Mr. Morrison arrived here what were Haley's duties with the company?

A. He was field superintendent.

Q. Was Mr. Lerche working under him at that time? [127]

A. No, sir, not at that time; they were both field superintendents.

Q. So from March '53 until the date of his discharge Mr. Lerche was under the personal supervision of Mr. Morrison, is that right?

A. That is right.

Q. And yourself when you were here?

A. That is right.

(Testimony of A. M. Fisher.)

Q. Can you tell us approximately how many times you were in Guam from September of '52 until May of '54? A. About fifteen.

Q. On an average how long would you stay here when you came to the island?

A. Anywhere from ten days to six weeks.

Q. And you have testified to bad experiences with Mr. Lerche on the Umatic School job, Cocos Island job, Atkins-Kroll and Curran jobs?

A. That is right.

Q. Do those represent the jobs you found fault with?

A. Not all of them. I found fault with other jobs too.

Q. I believe there was previous testimony that you probably broke even on Umatic School?

A. I think so, yes.

Q. How about Cocos Island job?

A. We made a little money on that. [128]

Q. How about Atkins-Kroll?

A. We made a little money on that.

Q. Now getting back to the Atkins-Kroll job in a little more detail. There has been some testimony here that no material was returned from that job. The testimony was that sheets of plywood and such should have been returned.

A. Construction material.

Q. Isn't it a fact that Atkins-Kroll furnished the siding and roofing for this job?

A. Not that job.

Q. The siding and roofing?

(Testimony of A. M. Fisher.)

A. Not that job they didn't furnish the sheet metal.

Q. The roofing? A. Probably the flooring.

Q. How much flooring would go on a job like that?

A. I don't recall right now; I would say probably 150 lineal feet.

Q. Normally wouldn't the person who estimated that job be able to pretty accurately determine how much would be needed?

A. No, you order ten percent more.

Q. But theoretically the ten percent could be used?

A. If it were used very often you would be out of business.

Q. You testified you probably made a little money on the Atkins-Kroll job, probably made a little money on the Cocos Island job and probably broke even on Umatic School; still for [129] the two years during which Mr. Lerche was working you show a loss.

A. All that time Mr. Lerche was spending money, his salary was going on and you have shop overhead and camp overhead. I don't think what we gained amounted to \$5,000.

Q. That he made for you?

A. That he made but that was net.

Q. Well, now was Mr. Haley estimating jobs for the company out here?

A. No, he didn't; he never did. He estimated one job; that was the Santa Rita power job.

(Testimony of A. M. Fisher.)

Q. Did you make money or lose money on that?

A. We lost money.

Q. Is it correct that Honolulu estimated most of the jobs?

A. They estimated all of the pipeline jobs and until Mr. Morrison came here the larger building jobs.

Q. When you say Honolulu did the estimating, who actually did the estimating in Honolulu?

A. Tom Juile, vice president.

Q. And when Mr. Morrison got here he estimated most of the jobs?

A. Mr. Morrison also estimated jobs before that on a fee basis.

Q. Well, somewhere along the line someone estimated you out of \$200,000? [130]

A. Yes, sir.

Q. And it wasn't Mr. Lerche?

A. You can spend \$100,000 like that——

Q. The jobs you complain about are the jobs you made money on.

A. When you say you make money or lose money let's get down to brass tacks. I am talking about a gross profit on a job. When we figure overhead and everything else in there that job presumably made money or didn't make money in the overall operation.

Q. But in the overall operation somebody lost \$200,000? A. That is probably true.

Q. And I don't believe you can attribute it to Mr. Lerche?

(Testimony of A. M. Fisher.)

A. I attribute it, a great deal of it, to Mr. Lerche's inability to stay put or do the job he was supposed to.

Q. This staying put is regardless of having widely scattered jobs in widely scattered places and not being the same place where Mr. Morrison was?

A. Widely scattered? I am not questioning you. You are questioning me. After Mr. Morrison got here he was a field superintendent but as field superintendent he was tremendously expensive and nobody could find him.

Q. Do you feel that Mr. Lerche was the man who lost you the \$200,000?

A. No, he lost his share. [131]

Q. The jobs he estimated didn't lose money.

A. Those weren't the only jobs he ran.

Q. I am mentioning the only jobs you people have mentioned here today.

A. Bilmar—he lost money on that.

Q. The whole contract was only \$1,100.

A. We were hooked with overhead and everything else to about \$500 on that.

Q. Did he lose money for you on the Air Force jobs?

A. He had nothing to do with the Air Force jobs except supply and we made money on the Air Force jobs in spite of Mr. Lerche, not because of Mr. Lerche.

Q. What jobs did you lose money on?

A. We lost money on Adelupe School. We lost money on the Santa Rita job; we lost money on

(Testimony of A. M. Fisher.)

general overhead where we had nothing but overhead. The presumption that we would discharge a man who was making money for us is pretty far-fetched. We are always looking for men who will make money for us.

Q. Isn't it a fact that, Mr. Fisher, that you didn't consider Mr. Lerche a satisfactory employee from the day you hired him? A. Almost.

Q. Isn't it a fact that you sent Dieckman out here to fire him?

A. No, I sent Morrison. I said, "As soon as you can get [132] rid of Haley and Lerche, do so."

Q. And that was March of '53?

A. March. Morrison felt he could save them both and I sent Dieckman out. Dieckman was just as bad a choice—to take Lerche's place.

Q. Dieckman came in September or October '53?

A. Somewhere along there.

Q. And somewhere around March of '54 Mr. Lerche was given a raise?

A. As soon as I got rid of Dieckman, Lerche seemed to improve.

Q. You got rid of him that fast?

A. Yes.

Q. He only worked about three or four months?

A. Just about.

The Court: I am not entirely clear, Mr. Fisher, as to your testimony on Umatic School. Mr. Morrison's testimony was that you were \$5,000 under the next lowest bid. A. That is right.

(Testimony of A. M. Fisher.)

The Court: Well, you only get jobs when you are the lowest bidder, don't you? A. That is right.

The Court: Do I understand from that then, according to your best judgment, that the next lowest bidder was \$15,000 under cost?

A. Well, your assumption is that you make ten percent on these jobs; you don't.

The Court: No, I based that on the fact you said you lost because of Mr. Lerche's failure to properly estimate and so forth—that you lost \$15,000 or \$20,000.

A. No, we didn't on that job. Had it been estimated correctly we would never had the job. We would have been either second or third high.

The Court: So that that \$5,000, as I say, that would indicate that the next lowest bidder hadn't sharpened his pencil enough either.

A. He had sharpened it too much, just as we had. Of course, that goes back to the old statement, your Honor: No contractor dies leaving money unless he dies prematurely.

The Court: Now Mr. Lerche said on the 24th of May you fired him and just paid him through that day?

A. I don't remember that, your Honor. It is just barely possible, but I couldn't answer that correctly unless I went back to the books and looked.

The Court: And nothing happened on the 24th of May or two or three days preceding it but on the 24th of May, because of an accumulation of errors, you decided that you would just get rid of Lerche?

(Testimony of A. M. Fisher.)

A. Well, I think the final straw was the valve coming in from Honolulu for this job with about \$150 air express charge on [134] it when Lerche previously told me he had everything ready to go.

The Court: Then the straw that broke the Fisher's back was the valve, the \$150 valve?

A. That is right, however, there was plenty of trouble accumulated before that. It wasn't just one valve for \$150. It was all of his errors that started coming to my attention and the inability to find Mr. Lerche when he was needed had a great deal to do with it, too.

The Court: Did you find out where he was?

A. No, that was one nice thing about Lerche—you could never find him.

The Court: Did he give you an explanation as to where he was?

A. Oh, yes, we got lots of explanations. Those were always back-explained. He wouldn't tell you where he was going to be beforehand.

The Court: Now on these jobs, other than Mr. Lerche, you had job foremen, didn't you?

A. Yes.

The Court: And couldn't those supervisors tell you what time Mr. Lerche had spent on the job at any given time?

A. That is right; those were questions that were answered, too.

The Court: Then you must have known he was on the job or driving between the jobs? [135]

(Testimony of A. M. Fisher.)

A. That is right and my determination was that he wasn't on the job.

The Court: When you confronted Mr. Lerche with that information what was his explanation?

A. There was always some alibi—he had to stop here and there or see some inspector or something of the sort. As a matter of fact, he would stop in the office to find out what the old man's disposition was and if he found I was pounding the pavement, he wouldn't bother to come in the office. It is easy to laugh about but it was my dollars that were involved.

The Court: My problem in this case is in determining why you continued to employ a man and increase his salary from the 29th of September 1952 until May 24, 1954 if he had all of the bad qualities that you describe. You are an efficient operator. You certainly know whether a man is lacking in those qualities that you thought you were buying.

A. When I sent Morrison out here in March of 1953 he was told to fire Lerche and Haley. Morrison wrote and said he thought he might be able to save them after all. When you give a man authority you give him discretion with it. Then I came out here and Morrison was busy with the hospital job. I sent Dieckman up here with instructions to fire Lerche as soon as Dieckman proved out. When he did not perform here I fired Dieckman and Lerche seemed to snap out of it. We thought he could turn into a good man. Basically he has got the ability

(Testimony of A. M. Fisher.)

[136] but something had gone haywire. I thought he had improved but the improvement was all imaginary, your Honor.

Mr. Crain: May I ask Mr. Lerche a question?

The Court: Oh, yes.

Cross Examination

Q. (By Mr. Crain): You stated you had foremen on the job who reported to you on Mr. Lerche's lack of appearance?

A. Only when we asked.

Q. They didn't make any general statement that Lerche was not on the job?

A. Not until asked.

Q. Then did they give you a sweeping statement?

A. No, they said he was on the job around 7:30 in the morning. They had asked him to bring some stuff out and they hadn't seen him since then.

Q. Who were they?

A. Well, one was a man by the name of Samma.

Q. Is he still here?

A. Yes—Oki, who is not on the island and a fellow by the name of Husman who is on the island.

Q. Is that about it?

A. No, one by the name of Frank Cortez who is not on the island.

Mr. Crain: All right, thank you. [137]

Mr. Turner: The defendant rests, your Honor.

The Court: Rebuttal?

Mr. Crain: Mr. Dieckman.

HAROLD DIECKMAN

called as a rebuttal witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. Harold Dieckman.

Q. Where do you live? A. Tamuning.

Q. By whom are you employed now?

A. Cyntor Construction.

Q. Were you ever employed by Fisher Construction Company? A. Yes, sir.

Q. Where were you hired by that company?

A. In Honolulu.

Q. Were you employed at the time you were approached by Fisher Construction Company and offered a job? A. Repeat the question.

Q. Were you employed in Hawaii at the time that you were approached by Fisher Construction Company and offered a job? A. Yes.

Q. Who did you work for? [138]

A. The Territory of Hawaii.

Q. What was your job?

A. Superintendent of prison maintenance.

Q. When did you come to Guam for Fisher Construction Company?

A. August 19, 1953.

Q. What was your position to be in Guam?

A. Assistant manager of Guam-Pacific operations.

Q. You came to Guam and entered upon the

(Testimony of Harold Dieckman.)

performance of your duties in that job, is that right? A. Yes, sir.

Q. When did you leave the employ of Fisher Construction Company? A. April 1954.

Q. Did you know Mr. C. W. Lerche during the time you were employed by Fisher?

A. Yes, sir.

Q. In the course of your employment did you observe him on or about the various jobs that he was employed on? A. Yes.

Q. Did you find him to be a person reasonably experienced in the work that he was doing?

A. Yes.

Q. What would you say as to the workmanlike manner in which he performed his work for Fisher Construction Company? [139]

A. I would say it was above average.

Q. And you were able to observe him in his work up until the time that you left the company yourself, is that right?

A. I wasn't in a position to observe his operation in the latter half of my stay with Fisher.

Q. What was the reason for that?

A. Well, I was confined to work on the Guam Memorial Hospital. His work took him different parts of Guam.

Q. So it was just during the first half of your tour of duty on Guam with Fisher that you were able to observe him? A. Yes.

(Testimony of Harold Dieckman.)

Cross Examination

Q. (By Mr. Turner): Were you discharged by Fisher Construction Company?

A. Yes, sir.

Mr. Turner: That is all the questions I have.

Examination by the Court

Q. What was your salary with Fisher?

A. \$250 a week.

The Court: No other questions. Thank you.

Mr. Crain: Mr. Poole.

FREDERICK M. POOLE

called as a rebuttal witness by the plaintiff, was duly sworn and testified as follows: [140]

Direct Examination

Q. (By Mr. Crain): Please state your name.

A. Frederick M. Poole.

Q. Where do you live?

A. Government of Guam quarters 1025, Mangilao.

Q. Are you an employee of the Government of Guam? A. I am.

Q. What is your job?

A. I am head of the Engineering Division, Department of Public Works.

Q. How long have you been in that job, Mr. Poole? A. Two years.

Q. When did you come to Guam?

A. 9th of March 1953.

(Testimony of Frederick M. Poole.)

Q. In the course of your job have you had occasion to do business with Mr. C. W. Lerche?

A. Yes, I have.

Q. Was that primarily during the time that he was in the employ of Fisher Construction Company?

A. It was.

Q. On what particular jobs did you have cognizance of his work or do business with him?

A. On the Umatic School job.

Q. What were your duties on the Umatic School job?

A. Well, as part of my duties I have charge of contract [141] administration so I was administering the Fisher contract for Umatic School.

Q. Did that mean you spent a considerable amount of time at the jobsite?

A. Very little.

Q. Where did you do your contract administering?

A. Mostly out of the office. We have an engineer inspector.

Q. Did Mr. Lerche have occasion to come to your office then concerning the operation of Umatic School job?

A. He did on various phases of it.

Q. And did you also receive reports from the inspectors who were on the job itself?

A. I did.

Q. Did you ever receive any complaints as to the caliber of Mr. Lerche's work?

A. No, we didn't.

(Testimony of Frederick M. Poole.)

Q. Did you find him to be reasonably efficient on the job?

A. I would say we had no complaints on the job at all during the time. The progress was satisfactory.

Q. Did you find Mr. Lerche to be cooperative?

A. Quite.

Q. Did he appear to be looking out for the business interests of Fisher Construction Company?

A. I think that he was very much. [142]

Cross Examination

Q. (By Mr. Turner): Your only contact with Mr. Lerche was at the office of Public Works, wasn't it?

A. Yes, with the exception of a few times I made occasional trips to Umatic.

Q. And what type of contact would you have with Mr. Lerche up at the office?

A. Well, it was usually a question of interpretation of plans and specifications or sudden changes.

Q. And very little in the field?

A. Very little in the field—just going down and inspecting the job.

Q. You didn't necessarily go with Mr. Lerche all the time down to inspect the job, did you?

A. I don't believe I ever went with him to inspect the job.

Q. When you went down to look at the job didn't you deal with the superintendent actually in charge of the job?

(Testimony of Frederick M. Poole.)

A. Most of the time; occasionally we would find Mr. Lerche down there.

Mr. Turner: That is all.

Examination by the Court

Q. Mr. Poole, do you recall the Umatic School contract? A. I do, yes, sir. [143]

Q. Did you help make the estimates as to the approximate cost of that job?

A. No, sir, I did not. I did not get into that job until December of 1953 and the estimates had all been made and the contract had been let before I took over that office.

Q. You have no way of knowing then whether the lowest bid corresponded with your estimates?

A. No, I don't without looking it up in the file.

The Court: Thank you very much, Mr. Poole. You may be excused.

Mr. Crain: That is all, your Honor, except I want to refute—I would like to put Mr. Lerche on for a few questions if the court please.

The Court: Very well.

C. W. LERCHE

previously called as a witness in his own behalf, was recalled in rebuttal in his own behalf and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crain): The witness is reminded that he has already been sworn. Mr. Lerche, you

(Testimony of C. W. Lerche.)

have heard the testimony here of various people that you were derelict in your duty in several ways in your employment with Fisher Construction Company. One item that was specifically mentioned was that you did not return material from [144] jobs then that was reduced to possibly the Atkins-Kroll job and Umatic School, which you did not furnish the correct estimate. I believe there was one other—oh, the Bilmar Market I believe was the third one. What was the nature of the Atkins-Kroll job?

A. It was an addition of a salesroom on existing steel frame building, which was a covered roof and siding with corrugated asbestos cement.

Q. In other words, was there any sheet metal that went into that addition that was put on that building?

A. There were the gutters, down spouts and a certain amount of plumbing, all of which was ordered after the job was measured so there wasn't any occasion to return material.

Q. Where was the plumbing, gutters and down spouts ordered from?

A. It was picked up at Mr. Bogovich's place of business down in Asan.

Q. The metal shop? A. Yes.

Q. It was made to order?

A. It was prefabricated and we just measured up how much footage we needed and there would be no return on any material there.

Q. Would you have occasion to return any of the material used on the Umatic School job in view

(Testimony of C. W. Lerche.)

of the fact you were discharged before it was completed? [145]

A. There was a certain amount of forms, panels and other stuff that was returned during the time I was with Fisher Construction Company.

Q. It was returned to the warehouse, is that correct?

A. Yes and coming back to the Atkins-Kroll job there was very little cement work on the job; therefore there was no return of form lumber and the siding—that was all furnished by Atkins-Kroll outside of the contract price.

Q. Now going back to the windows that you ordered for Mr. Bogovich were those ordered before or after Mr. Fisher made the statement to you that he did not want any work done for Mr. Bogovich?

A. About three or four weeks before.

Q. Referring to Mr. Bitting's testimony that he saw you in an automobile down at Umatic drinking a beer with four BPM men, is that correct?

A. It probably is. It was on a Sunday. I was down there calling on the job and the job was going and the superintendent had two BPM men visiting him on the job for the day and I believe we had a bottle of beer in the automobile at lunch time.

Q. Referring to this valve that has been testified about here that was supposedly air-freighted in from Honolulu, do you know anything about the valve?

A. No, the only thing I can think of is that

(Testimony of C. W. Lerche.)

after the job was actually in progress there was a change made on one of the [146] down runners of the drain from the roof which required a valve.

Q. When would that change have been made in relation to the starting date of the job?

A. Just about at that time.

Q. Referring to the testimony on the Thomas Curran house did you have anything to do with that job?

A. Not until the day that Mr. Fisher came out here and received that letter. That was when he talked to me about as to what was taking place up there. Prior to that I had not even seen the job with one exception. Mr. Guy up there wanted me to advise him as to some material that was going into the job.

Q. At any time prior to the time Mr. Fisher called your attention to the job in March 1954 or subsequent to that date had Mr. Morrison questioned you concerning that job?

A. (Shakes head).

Mr. Crain: I have no other questions.

Cross Examination

Q. (By Mr. Turner): Is it true that you were asked to go up and look at the Curran job in the spring of 1954 and you came back and reported that it was all completed? A. No, sir.

Q. With reference to the valve that was brought out for the Cocos Island job, is it your testimony

(Testimony of C. W. Lerche.)

that this change was made just before the construction started? [147]

A. I am quite sure it was.

Q. Are you certain?

A. I am quite sure.

Q. Why did you order windows for Mr. Bogovich?

A. Because at that time Mr. Bogovich wanted to save time on construction and it was verbally conceded that we were to do the work at the time.

Q. But you didn't take this up with the office or anything—you just ordered the windows?

A. I took it up with Mr. Morrison and told him what we were going to do, that we were going to order the windows and Paul Bogovich would pay for them direct.

Mr. Turner: That is all I have.

Examination by the Court

Q. What is all this—you heard Mr. Morrison's and Mr. Fisher's testimony about the Umatic job, Mr. Lerche, about failing to take off large numbers of items and so forth? What is your version of that?

A. I concede that I may not have been high enough on my equipment rental that was set up for the job. It is my recollection that the only raise that was made in my estimate was the \$15,000 that Mr. Fisher added on to the price of my estimate.

Q. Now you heard the testimony about the—I

(Testimony of C. W. Lerche.)

call it weather stripping on the double doors, the failure to include [148] that in your estimate?

A. So far as my purchase order, at the time it was my understanding that was supposed to be furnished from a firm in Honolulu from whom we bought other items of metal at the time.

Q. I don't quite understand that. The criticism was that there weren't enough included to take care of all the double doors——

A. You issue an order to cover all the items in the specifications and miscellaneous items and it is my recollection that this was a miscellaneous item that was included in that specification for which order was sent to Honolulu.

Q. Because the specification was inadequate?

A. No, because Honolulu's interpretation of the specification was.

Q. Then what happened when you didn't get enough?

A. Same thing as happened on several other jobs—they come out short and then you have to go back and have them furnish the material, but in that case where it is definitely stated that it is an order in accordance with plans and specifications, I would construe that Mr. Fisher had a right to collect his air freight from the Honolulu concern who accepted the order.

The Court: Well, any other questions?

Mr. Turner: I wasn't quite clear—would he send the specifications to the company in Honolulu who was going to supply [149] the material?

(Testimony of C. W. Lerche.)

The Court: They ordered according to specifications and they read the specifications, according to his view, as calling for less material than that which they shipped and as a consequence they had to make up the deficiency by sending it air freight.

Mr. Crain: Is it my understanding that they ordered it out of Honolulu?

A. Not the Honolulu office.

Mr. Crain: In other words, who ordered those particular iron items? Did you order them from here?

A. Very likely; I can't remember the specific order now.

Mr. Crain: Would you order through the Honolulu office of Fisher or direct from the supplier?

A. Direct from the supplier.

Mr. Crain: But you would order them according to the specifications?

A. According to the plans and specifications and their bid of such and such a date.

Mr. Turner: A particular order wouldn't tell them how many to send you; it would just say "send according to specifications"?

A. That is right.

Mr. Turner: I have no other questions.

The Court: Very well, you may be excused, Mr. Lerche. [150]

Mr. Crain: Mr. Morrison, would you take the stand a moment please.

JAMES M. MORRISON

previously called as a witness by the plaintiff, was recalled as a rebuttal witness by the plaintiff and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crain): When you were previously on the stand weren't you questioned about the Curran house?

A. I don't know; I think so; I am not sure.

Q. I thought you were and I believe you testified at that time that you didn't know anything about that job.

A. I didn't know about it while it was going on. It was done prior to my time.

Q. Did you receive numerous complaints as mentioned in his letter? A. Yes, I did.

Q. What did you do with them?

A. I turned them over to Mr. Lerche.

Q. Did you get any report back from Mr. Lerche? A. Yes, I did.

Q. What was that report?

A. The report I had from him was that everything we were supposed to have done by our contract was completed. [151]

Q. Let me ask you—you heard Mr. Lerche testify as to how he would put an order in with a supplier in Honolulu. Is that the way ordering was usually done?

A. Not customarily. Occasionally you get bids from suppliers who have gone to the trouble of making a take-off of the materials themselves and they

(Testimony of James M. Morrison.)

will bid so many dollars to supply all the iron work for the job. However, that was not the case in this case.

Q. It was not?

A. No, they were ordered as individual items.

Q. Do you have those particular orders?

A. Yes—not with me. It never occurred to me they were going to be a matter of issue.

Q. But you have them?

A. Yes, certainly.

Mr. Crain: That is all. We submit the case, your Honor.

The Court: Argument?

Mr. Crain: We will waive argument.

The Court: The court finds the issues joined in favor of plaintiff against the defendant in cause of action No. 1 and finds judgment for the plaintiff in the amount of \$3,200 which represents 18 weeks at \$200 a week less \$400, which is Mr. Lerche's testimony as to what he earned in outside employment. I feel that the defendant is obligated by its contract under date of September 29, 1952, which employed Mr. Lerche for a period of [152] two years. While the defendant's testimony indicates that there were degrees of dissatisfaction with his work, the court certainly has to assume that as of February 1954, after he had been continuously employed by the firm since September 29, 1952 and when both the president and vice president of the Fisher Construction Company had familiarized themselves with his accomplishments or lack of

accomplishments, they were certainly on notice as to his qualifications and as to his abilities so that when in February of 1954 his salary was increased rather than his being discharged for past derelictions in the performance of his duty, the court must assume that his work in the main was not only satisfactory but that it was sufficiently satisfactory that it merited an increase in salary. Now, of course, construction work is highly competitive, and as Mr. Fisher and Mr. Morrison pointed out, it requires skill, training and understanding in order properly to figure a job in order to come out with a profit and that in the beginning, according to Mr. Morrison's testimony, a new firm oftentimes expects to lose money while it is getting established. If the Umatic job was as defective in the original estimates as was indicated here, it seems to me that the Honolulu office was in an excellent position to correct those lack of estimates. If Mr. Lerche had had the final say-so in the Umatic job, it's possible that he would have been quite delinquent, but he didn't. That was audited by Mr. Fisher, increases made, and further studies were made by [153] Mr. Morrison. Well, certainly such items as hardware should be apparent from those estimates. In the final analysis the court feels that what happened here is that Mr. Fisher got fed up and without reference to his obligation under his agreement to employ Mr. Lerche for two years, he terminated him arbitrarily, without notice; according to the testimony here without even giving him a week's pay or anything else—just said "You are through tonight." That isn't

what he said in his contract of September 29, 1952, and the court holds them to that contract. There being no further business to come before the court, we will stand adjourned except the counsel for the plaintiff will prepare findings of fact and conclusions of law and judgment and settle with the defendant within ten days if that is satisfactory.

(The court adjourned at 4:15 p.m., April 11, 1955.) [154]

[Endorsed]: No. 14842. United States Court of Appeals for the Ninth Circuit. Fisher Construction Company, Ltd., Appellant, vs. C. W. Lerche, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: July 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14842

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant-Appellant,
vs.
C. W. LERCHE, Plaintiff-Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Defendant-appellant, by its attorneys, hereby adopts as its Designation of the Record to be printed, the Designation of Record on Appeal filed in the District Court of Guam on the 11th day of July, 1955, and defendant-appellant further adopts as its points the Statement of Points filed in the District Court of Guam on the 11th day of July, 1955.

SPIEGEL, TURNER & STEVENS,
/s/ By GERALD G. WOLFSON,
Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 19, 1955. Paul P. O'Brien,
Clerk.

No. 14842.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FISHER CONSTRUCTION COMPANY, LTD.,

Appellant,

vs.

C. W. LERCHE,

Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLANT'S OPENING BRIEF.

SPIEGEL, TURNER & STEVENS,

613 Wilshire Boulevard,
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Attorneys for Appellant.

FILED

OCT 10 1955

PAUL P. O'BRIEN, CLERK

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No. 14842.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FISHER CONSTRUCTION COMPANY, LTD.,

Appellant,

vs.

C. W. LERCHE,

Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLANT'S OPENING BRIEF.

Suit was instituted in the court below by plaintiff, hereinafter referred to as appellee, against defendant, hereinafter referred to as appellant, for damages in excess of \$3,000.00 alleged to have been suffered by appellee on account of a breach of a contract of employment. After trial, before the court sitting without a jury, judgment was entered in favor of appellee and against appellant in the sum of \$3,200.00 and costs. This is an appeal from that judgment [Tr. pp. 15-16].

Jurisdictional Statement.

The court below acquired jurisdiction by virtue of Section 22(a) of the Organic Act of Guam (48 U. S. C. Sec. 1424(a)), which provides in part as follows:

“The District Court of Guam shall have, in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in section 451 of title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine.”

Jurisdiction of this court to hear this appeal is conferred by the provisions of Title 28, U. S. C. 1291.

Statement of the Case.

Appellee was employed by appellant for a two-year period beginning September 17, 1952 [Tr. p. 28]. On the 29th day of September, 1952, the parties entered into a written agreement confirming the terms of employment, which said terms provided, *inter alia*, that appellee would work for appellant for a period of two years at a salary of \$175.00 per week [Tr. pp. 6, 14]. Appellee's employment continued until May 24, 1954, when he was discharged by appellant [Tr. p. 14]. At that time, and from February 1, 1954, when appellant voluntarily raised appellee's wages, appellee was receiving the sum of \$200.00 per week [Tr. p. 14].

Appellee thereupon filed this action to recover from appellant damages he allegedly suffered as a result of

his discharge [Tr. p. 14]. After trial by the court sitting without a jury, the court found that appellee would have earned the sum of \$3,600.00 had he been permitted to complete the contract and further found that from the date of his discharge to the 29th day of September, 1954, appellant earned a total sum of \$400.00. Consequently, it ordered judgment entered against appellant and in favor of appellee in the sum of \$3,200.00.

The testimony further showed that between June 7, 1954, and September 29, 1954, appellee was employed by a building corporation known as Modern Builders and was to be paid "50 percent of the net" for his services [Tr. p. 33]. Appellee testified that there was no net profit for that period but that he had drawn the sum of \$400.00 "against anticipated profits" [Tr. p. 33].

Appellant now appeals from the judgment entered in the court below [Tr. pp. 15-16] and contends that the record does not support a judgment in the amount awarded to appellee by the court below.

Specification of Errors Relied Upon.

(1) The court below erred in allowing appellant only \$400.00 as an offset against the amount claimed by appellee.

(2) The court below erred in allowing appellee compensation to September 29, 1954, since the contract would have terminated on September 16, 1954.

(3) The court below erred in computing appellee's damages at \$200.00 per week instead of \$175.00 per week.

ARGUMENT.

I.

Since Appellee, Shortly After Being Discharged by Appellant, Entered Into the Employ of Another Contractor for a Percentage of That Contractor's Profit, Appellant Should Have Been Relieved of Any Obligation to Pay for Appellee's Services During the Period That Appellee Was so Employed.

In actions for damages arising out of dismissal from employment before the termination date of an employment contract, the employee is not necessarily entitled to the amount he would have received under the contract had he served until its termination date. As Cordozo, C. J., stated in his concurring opinion in *McClelland v. Climax Hosiery Mills*, 252 N. Y. 347, 358-359, 169 N. E. 605, 609 (1930):

“Upon a wrongful discharge of a servant during the term of employment, the *prima facie* measure of damage is the wage that would be payable during the remainder of the term. [Citations.] This is only the *prima facie* measure. There is no fixed and certain obligation on the part of the master to respond in damages for that amount. The obligation of the master is merely to pay whatever damages have actually been suffered, and these exclude damages that a servant, acting reasonably, would have diminished or avoided. . . .”

To the same effect, see 35 Am. Jur. 489-490, where the rule is stated as follows:

“ . . . the amount of damages recoverable for an employer's breach of a contract of employment for a determinate period, by an employee who has been

improperly dismissed before the expiration of the term of service, though *prima facie* an amount equivalent to the compensation stipulated for in the contract of employment, is to be reduced by the amount of any sums which previously were paid on account to the plaintiff under the contract of employment, and by the amount of actual earnings of the plaintiff from another employer during the remainder of the term of the contract, regardless of the nature of such employment, or by the profits of a business in which he has engaged in on his own account, realized during the term which the employment contract was to remain in force.” (Footnotes to the supporting cases have been omitted.)

The initial question here to be considered is whether the court below, in light of that principle of law, correctly assessed damages for the full balance of the contract in view of the fact that appellee was employed by another contractor for a substantial portion of that period.

Appellee testified that he was discharged on May 24, 1954, and began working for Modern Builders on June 7, 1954 [Tr. p. 33]. The terms of his contract with his new employer entitled him to “50 percent of the net” realized by Modern Builders [Tr. p. 33]. Appellee further testified that in fact there was no net profit “From the period of June 7, 1954, to September 29, 1954” [Tr. p. 33]. During that period, however, he drew about \$400.00 on account of anticipated profits.

We respectfully submit that since appellee was able to find employment in his trade and since he chose to work for a percentage of the net profit, he should not now be allowed to recover for the period he was employed although he testified that no net profit was actually realized.

To begin with, the record does not establish that a profit was not realized during the period in question. While appellee testified that no net profit was realized during the period June 7 to September 29, 1954, the testimony is ambiguous. Did appellee mean that if the books were closed on September 29 they would have shown no profit for that period or did he mean that no profit was realized for the work performed during that period? It may very well have been that payment had not been received for work performed during the period June 7-September 29 until after September 29, 1954. If such were the case, appellee might very well report no profit received or distributed as of September 29 although a profit for the period was actually realized and received at a later date. If in fact money was actually received after the close of the period for work done during the period, appellant should have received a credit therefor.

The same defect appears in connection with the drawing account. An analysis of the testimony at page 33 of the Transcript indicates only that appellee drew the sum of \$400.00 against anticipated profits during the period in question. Actually, appellant was entitled to any allowances that appellee drew whether during that period or after, so long as they were attributable to the period in question. The record is silent on this question.

Of course, whether appellant is entitled to a greater offset than allowed by the court in view of the aforementioned deficiencies in the record must be resolved in accordance with the rules governing the burden of proof. On this question there is a division of authority. While the prevailing rule seems to be that the burden of proof is on the employer to establish any offsets, several juris-

dictions place the burden upon the employee. The cases on both sides are collected in an extensive annotation at 134 A. L. R. 242. The majority view is generally supported by the argument that an employer is in as good position to know the prevailing labor market as the employee, for which reason the burden is properly on the defendant who raises the issue. This may be a proper rule in the ordinary case of discharge of an employee by an employer, although, as we will show, there is equal logic to the argument that proof of damage is a necessary element of plaintiff's case and therefore his burden. But the instant case is not an ordinary case; it is a peculiar one for the reason that we do not here have the ordinary situation of a discharged employee being unable to find other employment or obtaining employment of another kind at a lesser wage, about which the other cases generally speak. Rather, we have an employee who was willing to gamble on his wages by working for a percentage of profit and agreeing to a manner of compensation that could not be readily calculated except by someone familiar with the business. This is an altogether different problem.

In situations where an employee has been unable to secure employment, it is fair to argue that the employer is in as good a position to present the matter of mitigation of damages as the employee. We will show in a moment that even this position is not uniformly accepted. However, where the employee enters into a business and agrees to accept a percentage of the profits, the information necessary for the evaluation of damages is peculiar to himself and the others who worked with him. The employer is no longer in the same position as the employee and cannot be expected to disprove the employee's

case as well as the employee is able to prove the amount of damages. Hence, whether or not the prevailing rule places the burden on the employer generally, in cases such as this we submit that the reasoning of Wheeler, J., in his concurring opinion in *Grant v. New Departure Mfg. Co.*, 85 Conn. 421, 83 Atl. 212 (1912), is especially appropriate, even though Connecticut is one of the jurisdictions following the minority view. In that opinion he said:

“The doctrine that the employee, rather than the employer, should prove the inability of the employee to get work is sound in principle. The facts relating to the ability of the employee to get work are easily within his control. He knows, or may know, if he has done his duty. The employer may not know, though he be ever so diligent. After the employee leaves his service, he may go to some place quite unknown to his former employer. The employer cannot keep track of the whereabouts of his discharged employees and officials. Consider the burden this would place upon the employer of say 20,000. In practice it would result in most cases in the inability of the employer making such proof. He could not support the burden of proof. Hence the discharged employee would recover the face of his contract, and the rule of law limiting his recovery to his actual damage and compelling him to deduct from what his contract would have given him what he could have earned would be rendered nugatory. Such a result would be unjust to the employer and leave our law on this subject contradictory and illogical. It would violate two rules of law. The burden is on the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. Wigmore, Evidence, §2486;

Greenleaf, Evidence, §74. The burden is on the party who presumably has peculiar knowledge of a fact. Wigmore, Evidence, §2486.” 85 Conn. at 428-429, 83 Atl. at 214.

In the instant case, appellee plainly failed to carry the burden of proof. As we pointed out above, the record is open to the interpretation that profits were earned by appellee during the contract period even though they may not have been drawn or paid before September 29, 1954. Likewise, the failure to draw more than \$400.00 on account of such profits is not explained. Again, the important factor was not whether the money was drawn but whether appellee was entitled to an additional sum. Clearly, appellee had “peculiar knowledge of facts or control of evidence” to clarify and explain these points and therefore should be held to have had the burden of proof. 31 C. J. S. 721. Having failed to carry that burden, he should be denied recovery for the period June 7, to September 29, 1954.

Another principle supporting this conclusion should not be overlooked. Appellee, in accepting other employment, agreed to compensation based on a percentage of his employer's net profit. If he is entitled to recover from appellant for the period of such employment, he is then being given *carte blanche* to gamble at the expense of his former employer. For if the venture is profitable, the employee pockets all the gain; if unprofitable, the employer must pay him in full for wages lost. There is therefore every inducement for him to take exceptional risks instead of being compelled to abide by the ordinary rule placing on a complainant the duty to mitigate damages. At the very least, if the employee elects to gamble and the

venture proves unprofitable, the employer should be entitled to the fair value of the services the employee contributed to his new venture. Somebody, including the employee, received the benefit of those services, for without those services (even if the venture sustained a loss) there presumably would have been an even greater deficit to the employee and/or his co-venturer. It is unfair, therefore, to make the employer pay again for services that were beneficial to the complainant and his co-venturer.

II.

The Court Below Erred in Computing the Damages Due to Appellee.

In computing the sum of \$3,600.00 due appellee (before allowing credit for the sum of \$400.00), the court evidently allowed appellee the sum of \$200.00 a week for each week between May 24 and September 29. The court erred in two respects.

In the first place, the court assumed that the contract began on September 29, 1952, because the letter-memorandum of agreement was dated September 29, 1952. In fact, however, appellee entered upon his employment on September 17, 1952 [Tr. p. 28], and the letter-memorandum merely served "to confirm [the] verbal agreement" apparently reached by the parties when the employment began [Tr. p. 6]. The contract therefore would have terminated on September 16, 1954, in any event, and appellee should have been paid to that date only. Hence, appellant is entitled to an adjustment for wages for a period of two weeks, or in the sum of \$400.00.

The second error the court made in computing damages was in allowing appellee the sum of \$200.00 a week

for wages rather than the sum of \$175.00 a week as provided in the contract. Appellant had voluntarily paid appellee an additional \$25.00 a week during part of the period immediately preceding appellee's dismissal. This extra payment was purely gratuitous on the part of the employer and was not legally binding upon him. Just as appellant had the right to give appellee an amount in addition to that called for by the contract, he had the similar right to withhold the additional payments without justifiable complaint on the part of appellee. Since an amount greater than that required to be paid under the contract was ordered by the court below, the court to that extent erred.

Conclusion.

We respectfully submit that the judgment of the court below should be modified by eliminating therefrom wages allowed for the period June 7, 1954, to September 29, 1954. Further, if this court should rule that such allowance should not be made, the judgment should nevertheless be modified by allowing recovery at the rate of \$175.00 per week instead of \$200.00 and only until September 16, 1954.

Dated: October 7, 1955.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS,
Attorneys for Appellant.

No.14,842

IN THE

United States Court of Appeals
For the Ninth Circuit

FISHER CONSTRUCTION COMPANY, LTD.,
Appellant,

VS.

C. W. LERCHE,
Appellee.

Appeal from the District Court of Guam,
Territory of Guam.

APPELLEE'S BRIEF.

E. R. CRAIN,
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Attorney for Appellee.

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No. 14,842

IN THE

**United States Court of Appeals
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FISHER CONSTRUCTION COMPANY, LTD.,	}
<i>Appellant,</i>	
VS.	
C. W. LERCHE,	<i>Appellee.</i>

Appeal from the District Court of Guam,
Territory of Guam.

APPELLEE'S BRIEF.

Appellee herewith supplements certain data required by this Court which appellant failed to set out in its opening brief.

ADDITIONAL JURISDICTIONAL STATEMENT.

In addition to appellant's jurisdictional statement, appellee cites paragraph one of the complaint pertaining to jurisdiction (Tr. p. 3).

ADDITIONAL STATEMENT OF CASE.

Appellee does not agree with appellant's statement of the case. Appellee entered into a two year con-

tract of employment with appellant on September 29, 1952 (Tr. p. 128). He went to work for appellant *about* the 17th of September, 1952 (Tr. p. 28) (Emphasis supplied). Appellee received a salary increase on February 1, 1954 to \$200.00 per week, which increase was given because appellee was to take on additional work (Tr. pp. 14, 31-32), and the increased salary was paid to appellee from that date to the date of his discharge.

ARGUMENT.

I.

In its first specification of error appellant contends that appellee should not recover his wages for the balance of his contract from the date of his discharge. To substantiate this stand, it has quoted Justice Cardozo, from his concurring but separate opinion in *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 358-359, 169 N.E. 605, 609, but has quoted him only in part.

Continuing his remarks:

“Proof of a *prima facie* case will charge the master with a duty of going forward with the evidence. This does not mean that he has the burden of proof in the strict sense, a burden that would require him to plead the matter to be proved. (citations omitted) The statement is made not infrequently in treatise and decision that a servant wrongfully discharged is ‘under a duty’ to the master to reduce the damages, if he can. The phrase is accurate enough for most purposes, yet susceptible of misunderstanding if empha-

sized too sharply. American Law Institute, Tentative Restatement of the Law of Contracts, Section 328. The servant is free to accept employment or refuse it according to his uncensored pleasure. What is meant by the supposed duty is merely this: that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer.”

No such situation prevails in this case. Appellant not only failed to plead facts in mitigation of the appellee's damages; it also offered no proof. Appellant goes into considerable detail concerning matters upon which the record is silent, but upon which matters appellant was at full liberty to present evidence at trial on its own behalf. Appellee presented a *prima facie* case as to his earnings from the date of discharge to the termination date of his contract. The burden then fell upon the appellant to go forward with the evidence, if indeed it had any evidence to offer on the points.

Appellant construes the record in such a manner as to make it appear that appellee, after his discharge by appellant, made no attempt to secure other employment, and for reasons of his own, saw fit to take the employment appellant now complains of. The record does not bear out this contention (Tr. p. 33). From the record as cited above, appellee sought employment

from the 24th day of May to the 7th day of June, 1954, and obviously the trial court drew the inference from the testimony, uncontroverted, that the employment which appellee took was the only employment he was able to find after that lapse of time. Appellant's citation of the rule from 35 *Am. Jur.* 489-490 belies its contention that the facts in this case are peculiar and fall outside the rule. Condensed, the rule reads:

“The amount of damages recoverable for an employer's breach of a contract of employment for a determinate period, by an employee who has been improperly dismissed before the expiration of the term of service * * * is to be *reduced by * * * the profits of the business in which he has engaged on his own account, realized during the term which the employment contract was to remain in force.*” (Emphasis supplied.)

The only other case relied upon by appellant is that of *Grant v. New Departure Manufacturing Company*, 85 Conn. 421, 83 Atl. 212 (1912). Appellant cites at length from a minority opinion in that case. Examination discloses that it does not follow the connotation placed upon it by appellant. Actually, Justice Wheeler found that the plaintiff is not bound to present testimony upon the point of mitigation of his damages until that point is raised by the defendant employer.

In the same case, Thayer, J., for the majority stated:

“Nor is the defendant harmed by the finding (also complained of as having been found without

evidence), that from the time of his discharge until the end of the year the plaintiff was not able to obtain employment. The plaintiff had been paid in full to the time of his discharge. The defendant having broken the contract, the plaintiff, *prima facie*, was entitled to the balance of the salary stipulated to be paid * * * In the present case, * * * it was permissible for the defendant to show, either that the plaintiff had between his discharge and the end of the year found and accepted other employment, or that by proper diligence he could have found other employment. (citations omitted) The plaintiff was not bound to offer any evidence upon the question until it was opened by the defendant. The latter, having offered no evidence upon that question, he was not harmed by the finding complained of, because without such finding the plaintiff was entitled to the balance of his salary for the year.”

In the instant case, the employer never raised the point.

II.

Although the agreement between the parties in this cause is dated September 29, 1952, appellant contends that the contract actually dates from the 17th day of September, 1952, and that its termination date is September 16, 1954. The trial court heard the witnesses, weighed the evidence, and in its findings of fact found that plaintiff and defendant entered into a contract on the 29th day of September, 1952, whereby

plaintiff was employed by defendant for a period of two years from the date of said contract (Tr. pp. 14, 128).

In the case of *Gladys Belle Oil Company v. Clark*, 296 Pac. 461, the court succinctly analyzes the objection raised by appellant:

“Where parties reduce their contract to writing, all oral negotiations, statements, representations, and inducements leading up to the execution thereof, are merged therein and the rights of the parties must be determined and measured by the terms of the written instrument itself.”

III.

Appellant contends that the court erred in allowing damages to appellee in the sum of \$200.00 per week, rather than the sum of \$175.00 as specified in the original agreement.

While an oral agreement by an employer to pay an employee a wage in excess of that called for in a written contract in itself would not be binding upon employer for want of consideration, where performance under the new agreement has taken place on both sides, the employer, in essence, would be estopped from denying the existence of the new agreement.

“An agreement, when changed by the mutual consent of the parties, becomes a new agreement, which takes the place of the old, and consists of the new terms and as much of the old agreement as the parties have agreed shall remain

unchanged; in other words, a contract may be abrogated in part and stand as to the residue.”
 17 *C. J. S., Contracts*, Section 379, page 869.

In the case of *Perry v. Farmer*, 54 P. (2d) 999, a landlord over a period of time had accepted a lesser rent than that called for in the lease. While the court agreed as to the general rule that an executory oral agreement to modify a written contract would not be binding upon the landlord, the court further held:

“There is, however, an exception to this general rule which is almost as well recognized as the rule itself. If the modifying agreement has been fully executed or partially executed on both sides, neither party can repudiate that part which has been executed on the ground that there has been no consideration therefor.”

IV.

Appellant has argued three specifications of error. In essence, its entire argument is that the court failed properly to find the facts. Issue has been taken with the first part of the first finding:

“Plaintiff and Defendant entered into a contract, on the 29th day of September, 1952, whereby Plaintiff was employed by Defendant for a period of two years from the date of said contract, * * *” (Tr. p. 14.)

and all of the fourth finding as follows:

“That Plaintiff would have earned the total sum of Three Thousand Six Hundred Dollars

(\$3,600.00) had he been permitted to complete his contract with defendant and that from the date of his discharge to the 29th day of September, 1954, plaintiff earned a total sum of Four Hundred Dollars (\$400.00).” (Tr. p. 14.)

These findings of the court are substantiated by the record. The president of defendant corporation testified that the agreement dated September 29, 1952 between Mr. Lerche and his company constituted the agreement and that he signed it. He also stated that he had hired Mr. Lerche then (Tr. p. 128). There is no controversy between the parties as to the date of discharge of appellee by appellant. Therefore, the trial court’s first finding supports the further finding that appellee would have earned the total sum of \$3,600.00 had he been permitted to complete his contract. The record substantiates the court’s finding that at the time of the breach, appellee, by contract, was earning \$200.00 per week. Appellee made a *prima facie* case as to his earnings from May 24, 1952 to September 29, 1952 (Tr. p. 33) which appellant chose not to controvert.

The rule is well settled that the findings of the trial court will not be disturbed except where it is clearly shown that there is no evidence to support them. The rule is well stated in *Palacine Oil Company v. Commercial Casualty Insurance Company*, 75 F. (2d) 20:

“But under the evidence in the case, the question is not, as argued by Appellant, whether there is any evidence which supports the findings and judgment of the trial court, but rather whether

there is any evidence which even tends to support the contention of appellant that it was entitled to a declaration of law in its favor.”

Other decisions supporting this well settled rule are:

“The controverted issues turn largely on questions of fact as to which, as the District Judge saw the witnesses, his findings carry much weight and will not be set aside unless plainly wrong.” *United Kingdom Optical Company, Ltd., et al. v. American Optical Company, et al.*, 68 F. (2d) 637.

“The questions presented upon appeal are mainly questions of fact. This court may not overthrow the judgment of the trial court in its decision on questions of fact unless there is a want of evidence to support the judgment.” *Boyles v. Kingsbaker Brothers Company*, 53 P. (2d) 141.

“A reviewing court is not justified in disturbing a judgment unless it appears that upon no hypothesis is there sufficient evidence to support it (citations omitted).” *Hayward Lumber and Investment Company, a corporation, Appellant v. Sam Naslund, et al., Respondents*, 13 P. (2d) 775, 125 Cal. App. 34.

CONCLUSION.

It is respectfully submitted that the court below did not err in any of the respects asserted by appellant and that its findings of fact and judgment should not be disturbed. Appellee requests that the Court

review this appeal in the light of Paragraph 2 of Rule 26 of its rules.

Dated, Agana, Guam,

December 14, 1955.

Respectfully submitted,

E. R. CRAIN,

Attorney for Appellee.

No. 14,843

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCES FARRINGTON WHITEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

VS.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

BRIEF FOR APPELLEES.

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No. 14,843

IN THE

United States Court of Appeals For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,

Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,

Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal from a final judgment of the Supreme Court of Hawaii rendered on May 26, 1955, denying appellants' petition for writ of prohibition (R. 50). Notice of appeal was filed on May 31, 1955 (R. 52) accompanied by an affidavit of counsel that the value in controversy exceeds \$5,000 exclusive of interest and costs (R. 53).

Jurisdiction of the court below was founded upon Section 81 of the Hawaiian Organic Act (31 Stat. 157; 48 U.S.C. Sec. 631) and Section 10270 of the Revised Laws of Hawaii 1945. Jurisdiction of this Court rests on 62 Stat. 929 (28 U.S.C. Sec. 1293).

STATEMENT OF THE CASE.

This is an appeal from the final judgment of the Supreme Court of Hawaii denying a petition for writ of prohibition (R. 50). The petition, filed in the court below on April 26, 1955, sought a writ prohibiting the Circuit Judge from proceeding further with a case then pending before him entitled "In the Matter of the Trust Estate of Wallace R. Farrington, Deceased" (R. 1-9). That case came before the trial judge on July 30, 1954, on the petition of Edmond H. Leavey to be named successor trustee of the Farrington trust (R. 2). Elizabeth P. Farrington, Hawaii's delegate to Congress, and her two adopted children, filed an answer on August 5, 1954, denying Mr. Leavey's right to be named trustee, and a cross complaint asking the court to name successor trustees and nominating four persons from whom they prayed that the trial judge select three (R. 3, 78-82).

The cross complaint joined the appellants as parties. The appellants answered the cross complaint on August 26, and also filed a cross complaint alleging that they, as surviving children and grandchildren of Wallace R. Farrington, deceased, had a right to name the successor trustees because they constituted a ma-

jority in number and in interest of those having vested interests in the trust estate under Section 12572, Revised Laws of Hawaii 1945 (R. 3; Appendix I). Appellees answered this cross complaint on August 30, denying that appellants had sufficient vested interests to permit them to name successor trustees (R. 3). After a pretrial conference, an order was entered requiring the parties to brief the questions (1) whether Mr. Leavey was entitled to be named trustee and (2) whether the grandchildren of Wallace R. Farrington had vested interests in his trust estate. Appellees took the negative position on both questions. On October 26 the trial court ruled on these two questions, adopting the view urged by appellees (R. 3, 111).

On November 4 appellants filed an amended answer and cross complaint alleging that appellants Ruth Farrington Leavey and Frances Farrington Whittemore had the right to name successor trustees under Section 12572 because they had a majority in number and interest of the vested interests in the trust (R. 4, 111-112). This posed the fundamental question whether the adopted children of the deceased son of the testator had any interest in the trust estate (R. 112). Appellants moved for summary judgment on their amended cross complaint on November 10, 1954, and the matter was briefed and argued (R. 112). Before the trial court had decided this question, appellants moved, on January 3, 1955, for leave to file a second amended answer and cross complaint (R. 93, 95, 112). This motion was taken under advisement.

On March 7 the trial judge denied the motion for summary judgment and decided the law question involved in favor of appellees (R. 5, 112, 113).

On March 13, 1955, the term of United States District Judge J. Frank McLaughlin expired and on March 17, 1955, the trial judge permitted his name to be circulated, along with others, among the bar for endorsement as Judge McLaughlin's successor (R. 10-c, 10-f). On March 21, 1955, appellants sought to obtain final orders dismissing the petition of Mr. Leavey and their amended cross complaint, explaining that they desired to take an appeal from the adverse rulings of the court before trustees were appointed. These motions were opposed on the ground that the only matter left for determination was the appointment of successor trustees. The court took the motions under advisement (R. 5, 113). A month later, appellant Whittemore filed her affidavit of disqualification.

The trial court denied the motion to disqualify on April 25 (R. 10-h), and on April 26 appellants filed their petition for writ of prohibition. The affidavit in substance sets forth that the trial judge submitted his name for and received the endorsement of the Bar Association of Hawaii for appointment as a judge of the United States District Court, and that appellee Elizabeth Farrington, a litigant adverse to affiant, is Delegate to Congress from Hawaii and has power to help or hinder his appointment, which he should know from his political experience and from the press (R. 10-c to 10-f, 19-20). Affiant therefore

asserts that she believes that the trial judge had a personal bias and prejudice in favor of Elizabeth Farrington in the matter pending before him (R. 10-c, 20). The petition for writ of prohibition was argued orally and denied on May 19, 1955 (R. 11).

On May 31 the trial court heard arguments on a motion to stay proceedings pending this appeal and heard evidence relating to the qualifications of nominees for the trusteeship proposed by appellees (R. 135-164). The next day, June 1, 1955, the court entered an order finally disposing of all issues pending before him, including the appointment of trustees effective upon the filing of an approved bond (R. 110-115). On that same day, counsel for appellants applied to the Supreme Court for an order staying further proceedings before the trial judge until the determination of this appeal. The Supreme Court granted the motion in order that an appeal to this Court would not be deemed moot (R. 62-63, 125).

STATUTES AND APPLICABLE CANON.

The applicable provisions of the Hawaiian Organic Act and Statutes of Hawaii are set forth in Appendix I, and the applicable Judicial Canon is contained in Appendix II.

QUESTIONS PRESENTED.

This appeal involves the single question whether the Supreme Court of Hawaii properly refused to

issue a writ commanding the trial judge to halt further proceedings before him in the Estate of Wallace R. Farrington. This question has two parts:

(1) Did the Supreme Court of Hawaii err in holding the affidavit of disqualification insufficient under Section 9573, R.L.H. 1945?

(2) Did the Supreme Court of Hawaii err in refusing to prohibit the trial court from continuing to act?

We submit that both questions should be answered in the negative.

SUMMARY OF ARGUMENT.

An affidavit of disqualification must allege facts which will reasonably support an inference that the judge is prejudiced or biased. The affidavit in this case contains no facts from which a sane and reasonable mind could infer bias or prejudice. Nor does it show a violation of any canon of judicial ethics by the trial judge. The Supreme Court of Hawaii correctly held the affidavit of disqualification to be legally insufficient and properly refused to issue the writ.

The affidavit does not allege that the trial judge has any direct or indirect pecuniary interest in the outcome of the litigation before him.

The judgment of the court below correctly applied ordinary legal principles and should be affirmed.

ARGUMENT.

I.

THE RULING OF THE SUPREME COURT THAT THE AFFIDAVIT WAS LEGALLY INSUFFICIENT WAS CORRECT AND SHOULD BE AFFIRMED.

A. The affidavit failed to assert facts which would support a reasonable inference that the trial judge was prejudiced in favor of appellee Elizabeth Farrington.

The Supreme Court of Hawaii, in testing the sufficiency of the affidavit (R. 19), required that it should set forth "the reasons and facts for the belief the litigant entertains" and that these reasons and facts "must give fair support to the charge of a bent of mind which may prevent or impede impartiality of judgment." Thus the court below applied the standard adopted in *Berger v. United States*, 255 U.S. 22, 33 (1921), on the ground that the federal statute (36 Stat. 1090, 28 U.S.C. Sec. 144) is similar to the local statute (Sec. 9573, R.L.H. 1945) and there were no controlling precedents under the latter.

Reviewing the "reasons and facts" contained in the affidavit and purporting to support the charge of prejudice, the court below summarized the substance of the affidavit as follows:

In substance—except for conjectures and opinions of affiant—the affidavit sets forth as being the reasons and facts for the belief which the affiant entertains, no more than that Judge McGregor has submitted his name for and received the endorsement of the Bar Association of Hawaii for appointment as a judge of the United States District Court for Hawaii, to succeed a

present judge thereof whose term has expired; that Elizabeth Farrington (a litigant adverse to said Frances Farrington Whittemore) is the Delegate to Congress from Hawaii, and, as such, is able to further or to hinder the appointment of Judge McGregor to the judgeship for which he has received said endorsement; that Judge McGregor is aware of said ability of Elizabeth Farrington in her said political capacity and is also aware of press reports of her success in obtaining nominations by the President of the United States of others to judgeships in Hawaii, and also in obtaining confirmations by the United States Senate of such nominations; and that the affiant therefore believes that Judge McGregor has a personal bias and prejudice favorable to Elizabeth Farrington as a litigant adverse to said Frances Farrington Whittemore. . . . (R. 19-20.)

The court below held that the affidavit lacked requisite "definiteness of time and place and character of remarks or actions" which would "give fair support to a charge that the trial judge has a bent of mind that may prevent or impede impartiality of judgment . . ." (R. 20-21.)

In deciding that the affidavit must allege facts supporting a charge of a prejudicial bent of mind, the court followed settled Hawaiian law relating to the construction of similar affidavits. Thus where an affidavit was filed in support of a suggestion of disqualification for interest, the court found the affidavit deficient for failure to state facts from which the

court might determine whether a ground for disqualification exists.

Carey v. Discount Corp., 35 Hawaii 786 (1941).

The court there said:

Ordinarily the suggestion of disqualification or affidavit filed in support thereof should set forth the facts upon which the alleged disqualification is based and not mere conclusions of law. (p. 787.)

Furthermore, the court construed R.L.H. 1945, Sec. 9573, in a manner consistent with the intention of the legislature expressed at the time the act was passed. The act first became law as Act 292, S.L.H. 1931. The committee report of the House Committee on Judiciary reads in part as follows:

The purpose of the Bill is to provide for the disqualification of judges having personal bias or prejudice against a party to litigation, or in favor of an opposite party. The effect of the bill would be to disqualify judges who are biased one way or the other with reference to litigation pending before such judge.

The act gives a remedy against judges "who are biased." Clearly an objective standard was intended. The judge is recused only if facts are stated from which a reasonable person would draw an inference of prejudice on the part of the judge.

The federal statute has been similarly construed. The power of the judge to pass upon the sufficiency

of the facts and reasons stated in the affidavit cannot be controverted.

Berger v. United States, supra;

Ex parte American Steel Barrel Co., 230 U.S. 35, 45 (1913);

Price v. Johnston, 125 F. 2d 806, 811 (9th Cir. 1942).

The affidavit must state facts "which taken at their face value show bias and prejudice" and not "mere conclusions".

Calvaresi v. United States, 216 F. 2d 891, 900 (10th Cir. 1954).

Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the judge.

Hurd v. Letts, 152 F. 2d 121, 123 (D.C. Cir. 1945).

What are the facts in this affidavit which appellants claim will support a reasonable inference of bias and prejudice on the part of the trial judge? Justice McKinley, dissenting, gave his interpretation on the gravamen of the affidavit (R. 37):

. . . that on top of the relationship of judge and litigant the presiding judge superimposed a conflicting relationship, to wit, candidate for United States District Judge of Hawaii and territorial delegate from Hawaii

and this "incompatible relationship with one of the litigants" was brought about "by his voluntary act."

Appellants adopt this statement as a demonstration that the facts contained in the affidavit satisfied "the standards laid down in the Berger case." (Br. p. 18.) The basic fact in the affidavit is that the judge sought the endorsement of the Hawaii Bar Association for the position of United States District Judge at a time when an influential political personage was a party to litigation before his court. Since this party may exert influence for or against the judicial appointment, it is argued that the act of becoming a candidate for the federal judgeship "gives fair support to a charge of a bent of mind which may prevent or impede impartiality of judgment" and that from this fact "a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the trial judge."

There are no allegations that the trial judge said or did anything which would lead a reasonable person to believe he intended to favor the influential party litigant. The charge is based on the "incompatible relationship" from which it is inferred that this judge will favor the party who may have some influence on the outcome of his judicial aspirations, rather than do impartial justice. On this basis the judge must face the

ugly challenge for a judge to meet because it involves his state of mind and causes the plain inference that he would disregard his oath of office to preside fairly, impartially and justly.

Foley J., in *United States v. Titus*, 122 F. Supp. 179 (N.D. N.Y. 1954).

Judge McGregor has sworn that he “. . . will administer justice without respect to persons. . . .”¹ His acts are “clothed with the presumption” that he will do so.

Ferrari v. United States, 169 F. 2d 353, 355 (9th Cir. 1948).

At most, the affidavit reflects

. . . a supposition by the affiant of the judge's bias and prejudice and a disregard of any presumption in favor of his integrity. . . . (Rice J., majority opinion, R. 21.)

Are we to assume that the trial judge will disregard his oath of office and respect the person of Delegate Farrington and seek her favor in the hope that she will repay him with her support? This appears to us (as it did to the Supreme Court) a startling and unwarranted assumption. The same charge could be brought against any judge in any court before whom appear persons of affairs, power, influence or wealth. All the dissatisfied party need do is allege that the powerful person might exercise some influence on matters in which the presiding judge is interested. To be sure, as Justice Cardozo has reminded us, judges are subject to human limitations (Cardozo, *The Nature of the Judicial Process* 168 (1921)); but is this admitted sociological phenomenon to be made a vehicle to attack qualifications to sit as a judge, or to be a substitute for an appeal to correct his errors? In Hawaii,

¹Oath of office for United States judges, 28 U.S.C., Sec. 453.

where our judges, both territorial and federal, are probably less secure in their posts and incomes than any other judges in the world,² it would always be possible to charge a trial judge with respect for persons by claiming that he will favor important litigants to secure his own future.

This is not the interpretation of Section 9573 by our Supreme Court. Nor is it a proper construction of the federal counterpart. More than the mere relationship between aspirant judge and politically influential party must be asserted, for no sane and reasonable mind can infer prejudice from the relationship alone. A prejudicial bent of mind must be alleged. This is what Justice Rice meant when he said the affidavit lacked “. . . definiteness of time and place and character of remarks or actions by the trial judge. . . .” (R. 20.)

The mere fact that a judge occupies premises encumbered with a restrictive covenant with respect to race does not disqualify him from hearing a petition to have a similar covenant declared void. To infer personal bias and prejudice from this relationship would be a “farfetched conclusion.”

Hurd v. Letts, 152 F. 2d 121, 122 (D.C. Cir. 1945).

Similarly, an allegation that the judge was connected with a bank in the vicinity of the bank which

²Although territorial judges have a stated term of 4 years and judges of the U. S. District Court for Hawaii 6 years, both are removable at the will of the President. See Haynes, *Selection and Tenure of Judges* 11 (1st Ed. 1944).

affiant was accused of robbing was insufficient to show bias. The relationship of banker and bank robber was not so incompatible with impartiality of judgment that the judge should have recused himself in the absence of other facts showing a personal prejudice against the defendant.

Price v. Johnston, 125 F. 2d 806 (9th Cir. 1942).

In *Fieldcrest Dairies v. City of Chicago*, 27 F. Supp. 258 (N.D. Ill. 1939), the plaintiff charged that the judge was prejudiced in favor of the City of Chicago because he was dominated by the mayor and leading political organization and they desired to sustain the ordinance under attack. Holding the affidavit insufficient, the court said (p. 260):

Without a statement of the name of the informant, the time, the place and the occasion of the statement and of the substance of what was said and of facts supporting the conclusions stated in paragraph 6 of the affidavit, such affidavit is clearly insufficient.

Hence an allegation that the judge is dominated is insufficient without a statement of facts supporting the conclusion of domination.

The affidavit in question differs significantly from that in any of the decided cases. In those cases, the affiant charges that the judge has said or done something which has given rise to a reasonable belief of prejudice. The court reviews the facts and determines whether the belief of the affiant is reasonable. If so, he is disqualified. The affidavit here involved sets forth no word or deed of the judge from which

prejudice can be inferred. Instead, it sets forth the situation of the judge and the party, and asks the court to assume that the judge will violate his oath and sell his judgment for the Delegate's support. It further assumes that the Delegate, as a public officer, would violate her oath of office and make a corrupt bargain with the judge. In no case has such an affidavit of insinuation been held sufficient to recuse a judge.

Appellants advance the novel argument that the trial judge's refusal to recuse after finding the affidavit legally insufficient is in itself a basis for a finding that he is prejudicial (Br. p. 15). On the contrary, it is generally considered "the duty of the judge, when the showing for recusation is insufficient, to remain in the case."

Eisler v. United States, 170 F. 2d 273, 278 (D.C. Cir. 1948); cert. dismissed 338 U.S. 883 (1949); *Sanders v. Allen*, 58 F. Supp. 417, 420 (S.D. Cal. 1944).

On pages 8 and 9 of their brief, appellants describe subsequent proceedings which took place in the circuit court *after* entry of the judgment appealed from. Ostensibly these proceedings were included in the record to show that the case is not moot. However, they argue that it reveals

a course of judicial behavior unexplainable except in the light of a clear bias in favor of the Delegate and cannot but demonstrate that affiant's belief was borne out by subsequent events. (Br. p. 24.)

Anticipating that appellants would attempt to use the court's subsequent adverse rulings to bolster up their deficient affidavit, we moved to strike that portion of the designation of the record which included proceedings after judgment. The Supreme Court denied the motion on the apparent ground that it lacked power under Rule 75 (h) of the Federal Rules of Civil Procedure to strike the extraneous matter. Judge Rice, dissenting, stated that these matters

were not before or a part of the record of this supreme court or given consideration by us when our rulings were made. . . .³

Had the affidavit itself recited various adverse rulings, no matter how stringent or severe, it would have been insufficient.

Calvaresi v. United States, 216 F. 2d 891, 900 (10th Cir. 1954).

Appellants' reliance on subsequent adverse rulings to fortify their claim of disqualification gives a clue to what prompted the filing of the affidavit. The history of the proceedings is recounted in the Statement of the Case. The proceeding was commenced by Edmond H. Leavey on July 30, 1954, seeking appointment as trustee. Thereafter the parties to this appeal joined issue on several questions of law. Two of these questions were decided after full briefing on October 26, 1954 (R. 3). After this adverse ruling on their first contentions, appellants filed an amended cross complaint on November 4, 1954 (R. 4). On November

³The decision and dissenting opinion on this motion are made part of this brief as Appendix III.

10, 1954, appellants moved for summary judgment on their amended cross complaint (R. 4). The judge decided the "controlling issue of law" on March 7, 1955.⁴ The affidavit was filed on April 22, 1955. The only issue then remaining was the appointment of a successor trustee or trustees. This, it had been decided, lay within the discretion of the judge.

This history of rulings adverse to appellants⁵ shows that all substantial issues had already been decided before the affidavit was filed. From the prior rulings made against appellants, and their argument based on adverse rulings subsequent to the affidavit, one can readily infer that the interest in removing the judge is that of an unsuccessful litigant. But the statutory procedure is not established to permit paralysis of judicial action during the case.

Taylor v. United States, 179 F. 2d 640 (9th Cir. 1950).

The federal cases hold that the facts in the affidavit are of "paramount importance" *United States v. Onan*, 190 F. 2d 1 (8th Cir. 1951); Cert. denied 342 U.S. 869 (1951). However, appellants argue that litigants should believe that judges before whom they appear are unbiased, and this is as important as factual impartiality (Br. p. 23). We have no argu-

⁴The basic question of the case, whether adopted children of the son of the testator were "issue" of the testator. The trial court followed the controlling Hawaiian decision, *O'Brien v. Walker*, 35 *Hawaii* 104 (1939); aff'd. 115 F. 2d 956; cert. denied, 312 U.S. 707.

⁵An additional statement of the circuit court proceeding may be found in the trial judge's order of June 1, 1955 (R. 110-115).

ment with this principle. But a litigant's belief of bias or prejudice must be supported by facts from which a sane and reasonable mind "might fairly infer bias or prejudice on the part of the judge." We deny appellants' conclusion that the affidavit in question not only sets forth such facts, but that the judge who held the present affidavit insufficient showed "an arrogant disregard" for the principle that "justice must satisfy the appearance of justice" (Br. p. 23).

The affidavit is tested either to see whether the facts alleged support an inference of prejudice or to decide if the facts make the affiant's belief of prejudice reasonable. The same objective standard is applied in either test. Could a sane and reasonable mind fairly infer bias or prejudice from the stated facts? Appellants cite only the judge's candidacy for the federal bench and the fact that one litigant is Hawaii's delegate to Congress to support the rash charge that he has arrogantly disregarded the appearance of justice. Where are the facts? Implicit throughout appellants' brief is the idea that given the relationship of judicial candidate and politically important litigant, it follows that the judge will be partial. We deny that the conclusion follows upon the premise. The relationship arises from the background and associations of the parties (cf. *Price v. Johnston, supra*) and does not show a prejudice "regarding the justiciable matter pending before the court."

Eisler v. United States, supra.

Appellants also assert that the judge-litigant relationship here renders impartiality less likely than

disqualifying relationships of affinity or consanguinity (Br. p. 17), apparently taking issue with the old saw that "blood is thicker than water." This assertion contains the fundamental error in appellants' reasoning. They cannot support their claim under Section 9573 for they have no facts upon which to base an inference of a biased or prejudiced bent of mind. Actually, they object to this so-called relationship where the party litigant is in a position to speak for the trial judge whether he wants it or not—whether he needs it or not. But this relationship does not show prejudice under Section 9573 as construed by the Hawaii court, nor is it a relationship of affinity or consanguinity prohibited by Section 84 of the Hawaiian Organic Act.

Appellants are trying to create a new ground for disqualification, based on a cynical and erroneous assumption that at some time and under some circumstances all judges are apt to be respecters of persons in pursuit of self-gratification. We deny the basic assumption. We deny that it is either desirable or beneficial in the administration of justice to enlarge the grounds upon which a litigant may oust a judge from proceeding in a case regularly set before him.

The comment of the Court of Appeals for the Seventh Circuit in *Tucker v. Kerner*, 186 F. 2d 79 (7th Cir. 1950) at page 84, is particularly apt:

Plaintiff places much reliance and in its brief quotes copiously from *Berger v. United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481. He fails, however, to state the facts alleged in the affidavit

in that case, which are about as far from those alleged here as the North Pole is from the South.

B. Canon 30 of the Canons of Judicial Ethics is inapplicable.

Appellants argue that the judge's act of becoming a candidate for judicial office and sitting as judge in a case where Hawaii's delegate to Congress is a party violates Canon 30 of the Canons of Judicial Ethics (Br. p. 27). It is then argued that this violation strengthens the "fair support" which the affidavit gives to an inference of prejudice on his part (Br. pp. 25, 27). On the other hand, appellants admit

that a violation of Canon 30 is not of itself a ground for disqualification . . . under Section 9573 of the Revised Laws of Hawaii.

But the judge's act which appellants say violates Canon 30, i.e., declaring himself a candidate for the federal judgeship (Br. p. 27), is the same act which appellants have argued is ample grounds for disqualification under Section 9573 (Br. p. 17).

Canon 30⁶ enjoins a judge not to become a candidate for any political office *other than a judicial office*, and states that a judge running for political office should resign. The reason given for stating he should resign is

in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

⁶Judicial Canon 30 is set out in full in Appendix II.

Judges, however, are free under the canon to become candidates for judicial office.⁷ The act of the trial judge in announcing his candidacy is expressly permitted by its terms. However, the canon adjures judges who are candidates for judicial position to refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

Appellants claim that the judge's act of declaring himself a candidate for judicial position would tend to arouse suspicion of abuse of judicial power because Delegate Farrington is a litigant in a dispute before him arising out of a family trust. The claim is without substance.

Obviously, to determine whether a reasonable suspicion exists, one must determine whether a sane and reasonable mind would believe that the judge is abusing his power, or that he is incapable of judging impartially. Just as the affidavit contains no facts to support an inference of prejudice, so it fails to support a reasonable suspicion of abuse of judicial power.

Since Canon 30 permits the trial judge to be a candidate for the federal judgeship, we fail to see

⁷In all the states, apparently, any judge may be a candidate for any judicial office. Haynes, *Selection and Tenure of Judges* 17 (1st Ed. 1944). For a review of the political activities of judges in seeking election either to judicial or to nonjudicial office (despite the provisions of Canon 30) see Vanderbilt, *Minimum Standards of Judicial Administration* 15-17 (1st Ed. 1949).

how appellants can charge him with violating the canon by that very act.⁸

Section 9603, Revised Laws of Hawaii, provides as follows:

Superintendence of inferior courts. The Supreme Court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.

Appellants specified as one of the errors of the court below (Error 3, Br. pp. 9-10) that it failed to issue the writ pursuant to its general superintending power to prohibit the judge from violating Canon 30. However, appellants appear to have abandoned this ground in their brief, although it is mentioned in argument heading (Section I B, Br. p. 25). In any event, it seems obvious that if no adequate ground for disqualification is stated in the affidavit, the Supreme Court of Hawaii did not commit manifest error in refusing to prohibit the trial judge from sitting.

⁸Canon 13 is more appropriate to appellants' charge, since it prohibits a judge from allowing his conduct to give the impression "that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person." The affidavit actually charges that in affiant's belief Delegate Farrington can improperly influence the Judge and will unduly enjoy his favor and that he is affected by her rank, position or influence. But the only conduct which has given affiant that impression is the Judge's candidacy for judicial office. Therefore appellants retreat to Canon 30 dealing with candidacy, which, as we have shown, has no application to this case.

II.

THE TRIAL JUDGE WAS NOT DISQUALIFIED UNDER SECTION 84 OF THE HAWAIIAN ORGANIC ACT BY REASON OF PECUNIARY INTEREST.

The petition for the writ filed by appellants in the Supreme Court raised no question concerning disqualification under Section 84 of the Hawaiian Organic Act (R. 1-9). The basis upon which the writ was sought was disqualification under Section 9573 (R. 7). As a consequence, the opinion of the court (R. 14-28) did not discuss any question of disqualification for pecuniary interest. This was raised for the first time in the petition for rehearing before the court below (R. 45). The petition for rehearing was denied without argument (R. 48-49).

The affidavit does not state any pecuniary interest which the judge has in the outcome of the litigation concerning the Farrington trust, either directly or through a relative within the prohibited degree of affinity or consanguinity.⁹

Appellants reason by a series of speculations (Br. pp. 28-32) that (1) if Judge McGregor decides in favor of Delegate Farrington then (2) Delegate Farrington might support him in his judicial candidacy and (3) he might then be appointed United States District Judge for the District of Hawaii and (4) if he is so appointed, his annual compensation will be substantially increased. This argument of pyramided

⁹For the full text of Section 84, Hawaiian Organic Act, dealing with disqualification for relationship or pecuniary interest, see Appendix I.

hypotheses certainly does not warrant a finding that the trial judge has a direct (or indirect) pecuniary interest in the issue of the case before him. As was said in *Inhabitants of Northampton & Others v. Smith & Others*, 11 Metc. (52 Mass.) 390, 395 (1846) (quoted with approval in *Carey v. Discount Corporation*, 35 Hawaii 786, 787 (1941)):

It (the disqualification) must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried.

And in *People v. Whitridge*, 129 N.Y.S. 300, 304 (1911) (also quoted with approval in the *Carey* case, *supra*), the New York court said:

The interest which will disqualify a judge to sit in a cause need not be large, but it must be real. It must be certain, and not merely possible or contingent; it must be one which is visible, demonstrable, and capable of precise proof.

We submit that the imaginative reasoning of appellants as to the trial judge's pecuniary interest is no substitute for visible, demonstrable and precise proof. The court below, having no such proof before it, properly refused to rule that the trial judge was disqualified to sit by reason of a pecuniary interest in the cause before him.

Appellants rely on *Re Murchison*, 23 U.S. Law Week 4219, 99 L. Ed. 551 (Adv. Rep. 1955), in making their argument that the judge has a pecuniary interest requiring his disqualification. That case presented the question whether a judge acting as a "one man judge-grand jury" under Michigan law could act

as judge in the trial of witnesses accused of contempt of him in his capacity of judge-grand jury. The Supreme Court held that it was a violation of due process for the "judge-grand jury" to try the petitioners. Since the "judge-grand jury" is a part of the "accusatory process," he cannot be "in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."

In the *Murchison* case, the "interest" of which Justice Black spoke was the interest of a prosecutor to secure a conviction. His language affords no basis for concluding that the trial judge has a pecuniary interest in the outcome of the civil litigation relating to the Farrington family trust.

III.

THE SUPREME COURT'S CONSTRUCTION OF SECTION 9573, R.L.H. 1945, IS NOT MANIFESTLY ERRONEOUS AND SHOULD BE AFFIRMED.

This case presented to the Supreme Court of Hawaii a question of construction of the local judicial disqualification statute (Sec. 9573, R.L.H. 1945). That court construed both the statute and the affidavit strictly, following several federal cases construing the similar federal statute (28 U.S.C. Sec. 144) in so doing, and held that the affidavit of disqualification was legally insufficient (R. 18, 19, 22).

The rule relating to the review of decisions of the Supreme Court of Hawaii is well settled. *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938)

In *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949), the Supreme Court recognized that the territorial courts “are the natural sources for the interpretation and application of the acts of their legislatures. . . .”

This court has refused to upset “what appears to be a reasonable construction placed by the Supreme Court of Hawaii upon the controlling statute.”

Ward v. Booth, 197 F. 2d 963, 969 (9th Cir. 1952).

See also *Di Mello v. Fong*, 164 F. 2d 232 (9th Cir. 1947), which involved an interpretation of a private act and of the Hawaiian Organic Act.

The decision appealed from finds ample support in federal cases (pp. 9, 10, 13, 14, *supra*). It is an informed effort on the part of the Supreme Court of Hawaii to apply the standards of the *Berger* and other federal cases to the construction of the Hawaiian statute. Our local statute is substantially the same as the federal act, but the fact that the court below relied on federal cases in reaching its decision does not change the rule that

the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.

Waialua Agricultural Co. v. Christian, *supra* p. 109.

Far from being “manifestly erroneous”, an examination of the decision of the court below (R. 14-28) reveals that it is in full agreement with ordinary legal

principles. We submit that the judgment below should be affirmed.

CONCLUSION.

For the foregoing reasons, the decision of the Supreme Court of Hawaii refusing to issue a writ should be affirmed.

Dated, Honolulu, Hawaii,
November 14, 1955.

Respectfully submitted,
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Of Counsel.

(Appendices I, II and III Follow.)



Appendix.

Appendix I

STATUTES INVOLVED.

Hawaiian Organic Act, Sec. 84 (U.S.C. Sec. 636):

Sec. 84. *Disqualification by relationship, pecuniary interest, or previous judgment.* That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated. (31 Stat. 157; 36 Stat. 258; 48 U.S.C. 636).

Revised Laws of Hawaii 1945, Section 9573:

Sec. 9573. *Disqualification of judge; bias or prejudice.* Whenever a party to any suit, action or proceeding, whether at law, in equity, criminal, or special proceeding, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good

cause shall be shown for the failure to file within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify himself by filing with the clerk of the court of which he is a judge a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. (L. 1931, c. 292, s. 1; R.L. 1935, s. 3572.)

Revised Laws of Hawaii 1945, Section 12572:

Sec. 12572. *Nomination by beneficiaries; appointment of trustees.* Whenever any appointment of a trustee under a private trust shall be made by any judge of a court of record, if, prior to such appointment, beneficiaries who shall constitute a majority both in number and interest of the beneficiaries of such trust (as hereinafter defined) shall nominate for such trusteeship by an instrument or instruments in writing filed in said court any qualified person or corporation worthy in the opinion of such judge to be appointed, such judge shall appoint said nominee as such trustee, unless the express terms of the trust provide an effective method of nomination or appointment; *provided* that no person so nominated as trustee by the beneficiaries of any such trust shall be held disqualified to be appointed or to act as such trustee for the sole reason that he or she is a beneficiary or a possible beneficiary under such trust estate.

Majority etc., how determined. The term 'majority both in number and interest of the bene-

ficiaries of such trust,' as used in the foregoing provisions, shall mean a majority of the competent adult beneficiaries holding more than one-half of the value of the then vested interests held by all the competent adult beneficiaries in the trust; *provided* that, if the guardian of any spendthrift, non compos person, or minor, owning such a vested interest, when such guardian is not an adult beneficiary, or married to an adult beneficiary, of such trust, shall execute or join in the execution of any such instrument of nomination and present the same to the court (each such guardian being hereby authorized in his discretion either to execute or to refrain from executing such instrument of nomination, as in his judgment shall be in the best interest of his ward), then and in such event such spendthrift, non compos person or minor, and the value of his said interest shall be included in determining such majority both in number and interest of the beneficiaries of such trust. The value of the then vested interests shall be determined as of the date of the presentation of such instrument or instruments of nomination to the court, in the manner provided for the appraisal of similar interests under the laws of the Territory for inheritance tax purposes and as the same would be valued for said purposes if said trust had been created by instrument made in contemplation of the death of the person who created such trust and said trust had come into existence and said death had occurred on said date of presentation of said instrument or instruments of nomination; when more than one such instrument is presented to the court designating the same nominee, said

date of presentation for the purposes of this section shall be deemed to be the date when the last of such instruments is so presented.

This section shall apply to trusts created before, as well as to those created after April 28, 1943. (L. 1943, c. 68, s. 1 and part of s. 2.)

Appendix II

JUDICIAL CANON 30. CANDIDACY FOR OFFICE.

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position, he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power and prestige of his judicial position to promote his candidacy or the success of his party.

If a judge becomes a candidate for judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Appendix III

In the Supreme Court of the Territory of Hawaii,
October Term 1954.

Frances Farrington Whittemore, Ruth Farrington Leavey, Edmund H. Leavey, Jr., Catharine Farrington Hite, Joan Whittemore Close, Catharine Anderson Leavey, Alice Farrington Leavey, Charles Harrison Hite, Patricia Farrington Hite and Wallace Rider Farrington Close v. Elizabeth P. Farrington, John Farrington, Beverly Farrington Richardson and Calvin C. McGregor, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii.

No. 3032.

PETITION FOR WRIT OF PROHIBITION

Decision Upon Motion for Determination of Matters Contained in Record and to Strike Portion of Designation of Contents of Record on Appeal.

Argued June 27, 1955. Decided June 27, 1955.

Towse, C. J., Rice, J., and Circuit Judge McKinley
in Place of Stainback, J., Disqualified.

The respondents' motion for determination of matters contained in the designation of contents of the record on appeal and to strike items 13(d), 13(e),

13(f), and 13(g) from said designation is denied, Mr. Justice Philip L. Rice dissenting.

Dated: Honolulu, Hawaii, June 30, 1955.

/s/ Edward A. Towse,

Edward A. Towse, Chief Justice.

/s/ Frank A. McKinley,

Frank A. McKinley, Circuit Judge,
Substitute Justice.

Mr. Justice Rice, Dissenting.

I would grant instead of deny the respondents' motion for determination of matters contained in the designation of contents of the record on appeal and to strike items 13(d), 13(e), 13(f), and 13(g) from said designation.

It is my understanding of Rule 75(h) of the Federal Court Rules that this supreme court is the proper one—and has jurisdiction thereunder—to settle the record made to conform to the truth.

The opinion of this supreme court denying the petition for writ of prohibition in our number 3032 was entered and filed on May 19, 1955, and our decision denying a petition for rehearing thereof was entered and filed on May 25, 1955.

The referred-to items 13(d), 13(e), 13(f), and 13(g) are in re proceedings had in the trial court "In the Matter of the Trust Estate of Wallace R. Farrington, Deceased," numbered civil number 139, which were not before or a part of the record of this

supreme court or given consideration by us when our rulings were made which, respectively denied the petition for writ of prohibition herein and for a rehearing thereof, so, such items should not be incorporated in the record on the appeal from our said rulings to the United States Circuit Court of Appeals, Ninth Circuit.

/s/ Philip L. Rice.

No. 14,843

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCES FARRINGTON WHITEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,

Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,

Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

REPLY BRIEF FOR APPELLANTS.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 14,843

IN THE

United States Court of Appeals For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

REPLY BRIEF FOR APPELLANTS.

I. THE AFFIDAVIT STATES FACTS FROM WHICH A SANE AND REASONABLE MIND WOULD FAIRLY INFER BIAS OR PREJUDICE.

The appellees rest their case primarily on the following contention appearing at page 6 of their brief:

“The affidavit in this case contains no facts from which a sane and reasonable mind could infer bias or prejudice.”

This argument is made in the face of the following specific facts and reasons upon which the affiant's belief of bias is based:

1. That Delegate Farrington is asking the Circuit Judge to exercise his discretionary powers in Civil No. 139 by appointing her as trustee, or one of the trustees, of a substantial trust estate in opposition to the desires and wishes of the appellants and their assertion of disqualification;

2. That the Circuit Judge is actively seeking appointment to a Federal judgeship for the District of Hawaii;

3. That the Circuit Judge first announced his candidacy for the Federal judgeship while Civil No. 139 was pending before him and shortly before the matter of the appointment of trustees was to come on for hearing; and

4. That Delegate Farrington, one of the litigants in Civil No. 139, in her official capacity as Territorial Delegate to Congress from Hawaii, virtually holds the key to the judicial appointment which the Judge seeks.

Thus, in the words of the dissenting justice below (R. 37, 38), the Circuit Judge "superimposed a conflicting relationship, to wit, candidate for United States District Judge of Hawaii and territorial delegate from Hawaii" "on top of the relationship of judge and litigant," and thereby brought about "by his voluntary act" an "incompatible relationship with one of the litigants."

These are hard, cold facts, not mere conclusions of law or insinuations. Confronted by such facts, it is incredible that anyone could seriously contend that the affidavit contains "no facts from which a sane and reasonable mind could infer bias or prejudice." A reasonable mind, we submit, should find it difficult to form any other inference from such facts; and unless there is some positive law that prevents it, this Court should act to prevent an obvious miscarriage of justice.

It is apparent from the arguments made at page 15 of their brief that appellees misconceive the standard adopted in *Berger v. United States*, 255 U.S. 22 (1921), for testing the sufficiency of a disqualifying affidavit. Appellees argue that the affidavit here "asks the Court to assume that the judge will violate his oath and sell his judgment for the Delegate's support" and that it "assumes that the Delegate * * * would violate her oath of office and make a corrupt bargain with the judge." Affiant does not ask the Court to make any such assumptions, for the simple reason that such assumptions are not a prerequisite to a finding that the affidavit is legally sufficient. If, as the appellees apparently misconceive the standard of legal sufficiency, an affidavit of bias were required to set forth words or deeds of the judge which justified a finding of such a "corrupt bargain," then a "sufficient" affidavit would not only disqualify the judge in a particular case, but should result in his removal from judicial office. This is obviously not the standard adopted in the *Berger* case.

An assumption that a judge will "violate his oath" or "sell his judgment" is no more material to the question of the sufficiency of a disqualifying affidavit of bias than it is to the question of disqualification by reason of consanguinity or pecuniary interest. The only pertinent question is "whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the judge." *Hurd v. Letts*, 152 F. 2d 121, 123 (C.A.D.C. 1945). The inquiry need not and should not proceed beyond that point. Thus, under the *Berger* standard, not only is it unnecessary to assume that the judge "will sell his judgment," it is not even necessary, for obvious reasons, to make a finding of fact that the judge is biased. Mr. Justice McReynolds made this point clear in the *Berger* case when he said at page 43:

"Of course, no judge should preside if he entertains actual personal prejudice toward any party and to this obvious disqualification Congress added *honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances.*" (Italics added.)

A determined effort is made in appellees' brief to gloss over the specific facts and reasons upon which the affiant's belief of bias is based and to treat the charge as one that

"* * * could be brought against any judge in any court before whom appear persons of affairs, power, influence or wealth." (Appellees' brief, page 12.)

No such generalization is justified under the facts of this case. The facts here are peculiarly unique as to time and place as well as the actions and objectives of the individuals involved. The power, influence or wealth of a litigant, standing alone, is not the point involved in this case. Here, after the relationship of litigant and judge had already been created by Delegate Farrington, the Circuit Judge voluntarily created a new relationship between himself and the Delegate which is incompatible with that of litigant and judge.

II. AT THE TIME THE AFFIDAVIT WAS FILED, ONLY PRELIMINARY LEGAL ISSUES HAD BEEN DISPOSED OF BY THE CIRCUIT JUDGE.

A large part of the appellees' brief is aimed at diverting attention from the facts and reasons stated in the disqualifying affidavit to an argument that appellants' "interest in removing the judge is that of an unsuccessful litigant." In support of this contention, appellees state, at page 17 of their brief, that at the time the affidavit was filed

"The only issue then remaining was the appointment of a successor trustee or trustees."

Such underemphasis can hardly relegate the very essence of the case to the insignificant status of the "only issue then remaining." The record makes clear that the sole objective of the litigants in Civil No. 139 was, and still is, to secure the appointment of their respective nominees, or persons not disqualified, as

trustees of the Farrington Trust. All prior proceedings were concerned solely with legal issues preliminary to a hearing on all of the many important factual issues necessarily involved in the selection of worthy persons qualified to act as trustees in the best interests of the estate and the beneficiaries.

Appellees ingenuously admit at page 17 of their brief that

“This, it had been decided, *lay within the discretion of the judge.*” (Italics added.)

The very existence of such *discretionary* power in the Circuit Judge renders it doubly important that the exercise of such power be scrupulously impartial and free from any facts from which a sane and reasonable mind might fairly infer personal bias on the part of the Judge.

III. CANON 30 OF THE CANONS OF JUDICIAL ETHICS IS CLEARLY APPLICABLE.

Appellees assert at page 21 of their brief:

“Since Canon 30 permits the trial judge to be a candidate for the federal judgeship, we fail to see how appellants can charge him with violating the canon by that very act.”

Appellants, of course, do not deny that the Circuit Judge was free under the canon to become a candidate for the Federal judgeship. We place no significance upon that act, taken by itself. A violation of Canon 30 arises from the circumstances surrounding the Judge's candidacy. These circumstances are highly

significant. *First*, by reason of her official position as Delegate to Congress for Hawaii, Delegate Farrington virtually holds the key to the success or failure of the Circuit Judge's candidacy for the Federal judgeship. *Second*, at the time the Judge made himself a candidate for the Federal judgeship, Delegate Farrington, in litigation pending before him, was seeking to persuade the Judge to exercise his judicial discretionary power by appointing her as a trustee of a substantial trust estate, over the objections of appellants, all of whom are beneficiaries of the trust. *Third*, after public announcement of his candidacy, the Circuit Judge continued, and still continues, to sit as judge in that litigation. *Fourth*, after the Judge's public announcement of his candidacy, Delegate Farrington persisted in her efforts to persuade the Circuit Judge to appoint her to such trusteeship. *Fifth*, the Circuit Judge did not withdraw his candidacy.

Clearly, such facts "might tend to arouse reasonable suspicion that [the Circuit Judge] is using the power * * * of his judicial position to promote his candidacy." *Canons of Judicial Ethics*, Canon 30.

IV. THE "LOCAL LAW" RULE IS INAPPLICABLE.

The most recent statement by the Supreme Court of the United States on the scope of review of decisions of the Supreme Court of Hawaii was made in *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938). In that case the Supreme Court said, at page 109:

“Insofar as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory.”

What was said in that case was no more than a restatement of the rule formerly applied by this Court. In *Fernandez v. Andrade*, 59 F. 2d 681, 683 (C.A. 9, 1932), this Court said:

“It is well settled that local tribunals will not be overruled upon matters of purely local concern except in case of manifest error.”

The *Waialua* case itself indicates that no change in this existing rule was intended when, at page 107, it refers

“* * * to the rule of this Court that deference will be paid the understanding of Territorial courts on matters of local concern.”

The lower Court, in failing to hold the Circuit Judge disqualified under Section 84 of the Hawaiian Organic Act (48 U.S.C.A. Sec. 636), decided an issue, the correct decision of which depends wholly upon the construction or application of a law of the United States. This is a Federal question and not a matter of “local law.” *Gully v. First National Bank*, 299 U.S. 109 (1936). The rule of the *Waialua* case, therefore, obviously has no application in this appeal insofar as that issue is concerned.

Even aside from that issue, the “local law” rule is not properly applicable to any aspect of this appeal. This is not an ordinary civil action in which one of the parties seeks to recover money or property from another. Nor is this a case such as the *Waialua* case, which involved the validity of instruments and contracts executed within the Territory—a matter solely of local concern. Neither does this case involve the interpretation and application of a Territorial statute dealing with local property or civil rights. Decisions of this Court and of the United States Supreme Court which have invoked the “local law” rule find no parallel in this case. Here the controversy involves the disqualification of a judge under a system of courts established by a Federal law (48 U.S.C.A. Sec. 631)—a circuit judge appointed by the President of the United States by and with the consent of the Senate under authority of an Act of Congress (48 U.S.C.A. Sec. 633), whose tenure of office and qualifications are governed by Federal law (48 U.S.C.A. Sec. 633) and whose basic salary is established by an Act of Congress and paid by the United States (48 U.S.C.A. Sec. 634a). It seems apparent, therefore, that this appeal concerns more than mere questions of “local law” or even “general law” on matters of “local concern.”

As was said in the *Waialua* case, this Court undeniably has “complete power to review any rulings of the Territorial court on law or fact” under Section 1293 of Title 28, U.S.C.A. The voluntary restriction of this appellate jurisdiction, as embodied in the

“manifest error” rule should not, we submit, be extended to a case directly involving a judge in a system of courts established by and so directly dependent upon Federal law.

We find nothing in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949); *Ward v. Booth*, 199 F. 2d 963 (C.A. 9, 1952), or *De Mello v. Fong*, 164 F. 2d 232 (C.A. 9, 1947), cited by appellees, which would require the extension of the “local law” rule to a case of this nature. The vast distinction between this case and the typical “local law” case is illustrated by *Walker v. O’Brien*, 115 F. 2d 956, 957 (C.A. 9, 1940). In that case, which involved the interpretation of a trust deed, this Court specifically called attention to the factors which characterized the case as one of “local law”:

“The deed was executed in Hawaii. The property it conveyed was situate in Hawaii. The trustor, the trustee and all beneficiaries of the trust resided in Hawaii. The Supreme Court, therefore, was required to and did construe the deed in accordance with its understanding of the laws of Hawaii.”

It should further be noted that the legal sufficiency of an affidavit under Section 9573 had not been passed upon by the Supreme Court of Hawaii until this case. The lower Court itself expressly relied upon Federal cases arising under a similar Federal statute when it said (R. 19) that such cases “should be deemed applicable to said Section 9573” and that it “should be construed or deemed modified accord-

ingly.” The lower Court decision, therefore, was not based upon any settled principle in the Territory of Hawaii. Under such circumstances this Court should not consider itself bound to accept as conclusive the lower Court’s opinion that the affidavit is legally insufficient under the standard applied in the Federal cases. *Barber v. Pittsburgh, Ft. W. & C. Ry. Co.*, 166 U.S. 83, 103 (1896).

V. THE LOWER COURT’S DECISION IS
MANIFESTLY ERRONEOUS.

Even if the “local law” rule were deemed applicable to this appeal, it is our contention that the decision of the majority of the Court below, holding the affidavit legally insufficient under the tests applied in the *Berger* case, was manifestly erroneous.

This is not a case such as *Walker v. O’Brien, supra*, in which the Court viewed the case as calling for a choice between a narrow and a broad construction of a term used in a trust deed. This Court said, at page 957, that the adoption of the broad construction by the lower court did not make that construction manifestly erroneous inasmuch as

“The term has often been thus broadly construed.”

In the instant case the Court is not confronted with any such choice between varying interpretations or applications of governing principles or rules. The choice here is between black or white; there can be no off-shades. The affidavit is, as a matter of law,

either legally sufficient or legally insufficient under the rules established by the *Berger* case and upon which the lower Court professed to rely. We have already shown in this brief and in our opening brief that the facts and reasons stated in the affidavit give more than fair support to the affiant's belief that the Circuit Judge has a personal bias in favor of an opposing party. The lower Court, therefore, erred in holding the affidavit legally insufficient. This error, we submit, is clear and manifest. Surely, it is no less "manifest" than that error found in *Damon v. Hawaii*, 194 U.S. 154 (1904); *Carter v. Hawaii*, 200 U.S. 255 (1906), and *Bierce v. Waterhouse*, 219 U.S. 320 (1910), in which the Supreme Court of the United States reversed the Hawaiian Supreme Court in matters of purely local concern.

CONCLUSION.

Both the appellees' brief and the majority decision below proceed on the theory that absence of words or deeds showing some kind of "corrupt bargain" between the Circuit Judge and the Delegate renders the affidavit insufficient. They have confused *impeachment* for corrupt conduct with *disqualification* to sit in a particular case by reason of honestly entertained belief of *bias* "based upon fairly adequate facts and circumstances."

This failure by the Court below to recognize the vast distinction between *impeachment* and *disqualification* explains the error of the majority of the Court

below in holding the affidavit legally insufficient. The holding interjects into the law of disqualification a requirement of examination into the character traits and other subjective elements characterized by a judicial mind. It seems obvious that an objective rather than a subjective standard should be required. The error, we submit, is clear and manifest. More important, it directly involves the administration of justice in a Territorial Court over which this Court has been vested with supervisory and appellate power. Therefore, whether the error be deemed "manifest" or not, this Court should not hesitate to correct it.

Dated, Honolulu, Hawaii,
December 12, 1955.

Respectfully submitted,
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No. 14,843

IN THE

United States Court of Appeals
For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

VS.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS.

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vs.

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Appellees.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS.

PRELIMINARY STATEMENT.

Appellees, after conceding jurisdiction as shown by Appellants' affidavit (R. 53; Appellees' Brief, pp. 1-2), interposed a Motion to Dismiss on the ground that there is not the requisite value in controversy and the appeal involves no substantial question arising under the Constitution and the laws of the United States.

By leave of Court this Memorandum is filed which, we submit, clearly demonstrates that the Appellees' Motion to Dismiss is without merit.

QUESTIONS INVOLVED.

1. Is a final decision of the Supreme Court of the Territory of Hawaii in a prohibition proceeding challenging the competency of the trial court appealable under 28 U.S.C. § 1293, where the principal controversy involves the determination by the trial court of conflicting claims of trust beneficiaries to property rights having a value in excess of \$5,000?

2. Are Appellants' arguments that the judgment appealed from involves the Fifth Amendment, Section 84 of the Hawaiian Organic Act, and authority exercised under Federal law, so colorable as to leave this Court without jurisdiction to entertain the appeal?

I.

JURISDICTION OF THIS COURT MUST BE DETERMINED BY EXAMINATION OF THE ENTIRE CONTROVERSY OUT OF WHICH THE DECISION OF THE SUPREME COURT OF HAWAII AROSE.

Appellees' theory, found in their Memorandum, is that since the prohibition proceeding is an "original proceeding" in the Supreme Court respecting the right of a particular court judge to sit, no value measurable in money is involved in the controversy.

“The right to have one judge sit in place of another cannot be measured in money.” (Appellees’ Memo. p. 3.)

It “involves ‘no value in controversy’ since it cannot be measured in money.” (Appellees’ Memo. p. 8.)

“Nor can the jurisdictional amount be met by reference to possible cases other than the particular case on appeal.” (Appellees’ Memo. p. 5.)

At the oral argument the Appellees conceded that the appeal statute (28 U.S.C. § 1293) did not preclude this Court from examining the controversy pending before Territorial Circuit Court Judge McGregor. Appellees then proceeded to argue, inaccurately, we submit, that no ascertainable value was involved in said controversy.

It is clear under the procedure of the Territory of Hawaii a writ of prohibition is essentially an appellate process, the purpose of which is to preserve the integrity of a proceeding pending in an inferior tribunal where an ordinary appeal would be inadequate. The Territorial statute defines prohibition as follows:

“Definition. This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter

arising therein is beyond its jurisdiction, or that it is not competent to decide it.” (Sec. 10270, Revised Laws of Hawaii, 1945.)

The court below held that it had jurisdiction and power to issue the writ, stating in its opinion:

“It is the conclusion of this Court:

“(1) That, as the petition for writ of prohibition alleged personal bias and prejudice of the trial judge and so in effect challenges the competency of the trial court to act further in and decide pending matters in the case below, being said Civil No. 139, this Supreme Court has jurisdiction herein and the power to issue a writ of prohibition, by virtue of Section 10270, Revised Laws of Hawaii 1945;” (R. 18.)

The question on appeal here is therefore whether the court committed error in failing to disqualify the Territorial Circuit Court Judge. This portion of the holding by the court below, as quoted above, accords with the principle stated in *Minnesota & Ontario Paper Co., et al. v. Molyneaux*, 70 F. 2d 545 (C.C.A. 8th, 1934):

“* * * Where such appellate jurisdiction exists, the necessary original writs may be entertained for any purpose necessary to protect the full exercise of that jurisdiction. One situation classed within such protection of appellate jurisdiction is where the right of appeal exists but because of the presence of ‘“circumstances imperatively demanding”’ a departure from the ordinary remedy by * * * appeal’ (*Whitney v. Dick*, 202 U.S. 132, 140, 26 S. Ct. 584, 588, 50 L. Ed. 963) is neces-

sary. In such situation, the writs may be employed 'as an auxiliary process, and * * * as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways.' *United States v. Beatty*, 232 U.S. 463, 467, 34 S. Ct. 392, 394, 58 L. Ed. 686. This rule has been recognized in this, *Greyerbiehl v. Hughes Elec. Co.* (C.C.A.) 294 F. 802, 805, and *Turner v. United States* (C.C.A.) 14 F. (2d) 360, 361, and other courts, *Pickwick-Greyhound Lines v. Shattuck*, 61 F. (2d) 485, 487 (C.C.A. 10); *Blake v. District Court*, 59 F. (2d) 78, 79 (C.C.A. 9)."

The test of whether this Court has jurisdiction under 28 U.S.C. § 1293 to review the final judgment of the Supreme Court of Hawaii in a prohibition proceeding is whether this Court would have jurisdiction under 28 U.S.C. § 1293 to review the appeal in the principal case of which the prohibition proceeding is in aid. There is a clear analogy between the jurisdictional question raised by the Motion to Dismiss and the jurisdictional question arising in a separate proceeding in aid of or ancillary to a principal proceeding in a district court of the United States. It has been uniformly held that the jurisdiction of a federal court in an ancillary suit or a suit in aid of a principal case will be determined by reference to the jurisdictional basis of the principal case.

54 *Am. Jur., United States Courts*, Sec. 32, pp. 688 and 689:

"Ancillary, Auxiliary, and Supplemental Proceedings.—Jurisdiction of ancillary, dependent, or

supplemental suits or proceedings in a Federal court rests upon and is supported by the jurisdiction of the main suit. Thus, where the principal cause is within the jurisdiction of the court, as a Federal court, the proceeding ancillary or supplemental to it is also within that court's jurisdiction, regardless of the citizenship of the parties or the amount in controversy. In other words, the collateral proceedings come in under the jurisdiction acquired between the original parties, even though jurisdiction would have been lacking if such proceedings had been originally and independently prosecuted * * *

Accord:

2 Cyclopedia of Federal Procedure (3d, 1951)
Sec. 2.428.

In *Baush Mach. Tool Co. v. Aluminum Co. of America*, 63 F. 2d 778 (C.C.A. 2d, 1933) (Cert. den.), a motion to dismiss, for lack of jurisdiction, an appeal from a decree entered in an independent bill for discovery, was under consideration. The bill for discovery showed no diversity of citizenship or other jurisdictional facts, but the principal suit of which the bill for discovery was in aid, involved the Clayton Act. The Court of Appeals, Second Circuit, held that the decree was appealable, and the bill for discovery is “* * * dependent and ancillary for jurisdictional purposes, and jurisdiction over the bill may be sustained because of the jurisdiction had over the action at law * * *” The court said that it was not necessary to decide whether the bill for discovery was supported by Section 12 of the Clayton Act since

“It is sufficient for the purpose of this appeal to say that the bill is ancillary or auxiliary to the action at law and is thus supported by the undisputed jurisdiction of the action at law.” (p. 779)

Youngstown Bank v. Hughes, 106 U.S. 268 (1882), and *Arias v. Usera*, 38 F. 2d 235 (C.C.A. 1st, 1930), relied on by the Appellees (Appellees’ Memo., p. 4, 6), involved proceedings to enforce inspection which had no connection with the jurisdictionally supported principal suits, and which, so far as the record shows, might never result in controversies involving the jurisdictional amount.

A clear statement of the principle applicable in the instant case is found in *Brun v. Mann*, 151 F. 145 (C.C.A. 8th, 1906), which involved an action brought in the federal court against the administratrix of the estate of one Tillett, in aid of the judgment which had been rendered in the U. S. Circuit Court. Because the enforcement action was by a separate proceeding and there was no diversity of citizenship, a challenge was made of the jurisdiction of the federal court. The court said:

“Nor was the right of the complainant to invoke this jurisdiction conditioned by the existence of a federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in the absence of either of these attributes (1) to aid, enjoin or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment

or decree, therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done * * * (citations omitted) * * *” (p. 150)

Freeman v. Howe, 24 How. 450, 16 L. Ed. 749 (1861):

“A bill filed on the equity side of a federal court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties.”

And in *Krippendorf v. Hyde*, 110 U.S. 276, 28 L. Ed. 145 (1884), a separate proceeding had been brought by a third party to restrain a judgment. A motion to dismiss was filed for lack of diversity of citizenship. The Supreme Court of the United States held:

“* * * we think, that the court below should have regarded the present bill, not as an original bill invoking the general jurisdiction of the court in equity, but as an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself, incident to and dependent upon it.” (pp. 286 and 149, respectively)

The only authority referred to by Appellees involving a suit in aid of or ancillary to a principal suit is *Robert Hind, Limited v. Silva*, 75 F. 2d 74 (C.C.A. 9th, 1935) (Appellees' Memo., p. 7). A motion to dismiss the appeal in this court was filed on the ground that the separate equity suit brought for cancellation of a release procured for \$84.50 in a personal injury case did not have the requisite value in controversy. This court held that it was the value of the subject sought to be protected in the matter in controversy that was determinative of jurisdiction; and that in an injunction suit it is the value to the plaintiff of the right for which he prays protection, or value to the defendant of the acts of which the plaintiff prays prevention. The court further held that the requirement of Hawaiian law, that a separate proceeding be brought in equity to cancel the release to prevent its use in the principal law action, did not prevent the court from making the determination that the principal action involved a value in controversy in excess of the requisite \$5,000.

Contrary to the claim of the Appellees, the principle of *Robert Hind, Limited*, clearly supports the contention here made by Appellants. This, we submit, is true, since the principal suit from which Appellants seek to disbar the Territorial Circuit Judge is a suit which involves the protection of property rights in excess of the jurisdictional amount. It is also clear from *Robert Hind, Limited* that a determination of whether the value in controversy exceeds \$5,000 must be made by examining the controversy between the

parties in the principal suit of which the prohibition proceeding is in aid.

II.

THE PROPERTY RIGHTS SOUGHT TO BE PROTECTED THROUGH THESE PROHIBITION PROCEEDINGS INVOLVE VALUES MANIFESTLY IN EXCESS OF THE JURISDICTIONAL REQUIREMENT.

The attempt of Appellees on oral argument to isolate that element of the controversy relative to the appointment of successor trustees, in order to show that the jurisdictional amount is not present, does violence to the established rule of *Berryman v. Whitman College*, 222 U.S. 334, 56 L. Ed. 215 (1912), that jurisdiction is "measured by the value of the right to be protected, and not the value of some isolated element of that right"; and that a subject which is necessarily concluded by the decree must be included into account in considering whether there is jurisdiction over the controversy.

Accord:

Glenwood Light etc. Co. v. Mutual Light etc. Co., 239 U. S. 126, 60 L. Ed. 176 (1915);
Hunt v. N. Y. Cotton Exchange, 205 U.S. 322,
 51 L. Ed. 821 (1907).

The trial judge must decide important and highly controverted issues of property rights before the successor trustees may be appointed.¹ Such issues will

¹Appellants' brief, p. 3, refers to the determination of whether the adopted children of the deceased son of the testator (Appellees

be concluded by the decree and hence, the value in controversy must be determined by considering the value of the property rights sought to be protected.

It is only necessary for this Court to refer to the record, and the affidavit of value in controversy, to determine that the jurisdictional amount has been established under any one of the several tests. Pursuant to the requirements of 28 U.S.C. Sec. 2108, Appellants executed and filed the requisite affidavit at the time of appeal to this Court, setting forth that the value of the trust estate here involved is in excess of \$500,000, and that the value in controversy exceeds \$5,000, exclusive of interest and costs (R. 53).²

A. The interests of Appellants and Appellees in the income and corpus of the trust estate.

At the oral argument, the Appellees, referring to their own brief (Appellees' Brief, p. 3), admitted that "the fundamental question" in the case is whether Beverly Farrington Richardson and John Farrington,

John Farrington and Beverly Farrington Richardson) had any interest in the trust estate as the "fundamental question"; at page 17 of Appellants' brief the issue is called "the controlling issue of law"; at page 17, fn. 4, it is called "the basic question of the case."

²In this brief, Appellees conceded jurisdiction of this Court on appeal. It was not until the day before the oral argument, when Appellees filed a Motion to Dismiss, that any question was raised concerning the jurisdictional amount. The Affidavit of Value in Controversy filed by Appellants (R. 53) did not particularize the exact value of the entire estate other than to state that the value is in excess of \$500,000. The value of respective life estates, computed on annuity tables and the life expectancy of the beneficiaries, are each far in excess of the jurisdictional minimums.

Appellants contend the record before this Court substantiates the requisite jurisdictional value. Had a timely counter affidavit or motion been filed, other competent direct evidence could have been submitted pursuant to 28 U.S.C. § 2108.

two of the Appellees herein, being the two adopted children of the son of the testator, Wallace Rider Farrington, have any interest in the trust estate. This question depends upon whether these two Appellees are "issue" of the said testator under the terms of the will (R. 84, 86). If it is determined in the principal suit that these two adopted children are not issue, interests in the estate are affected as follows:

(1) The interests in the life income in the trust estate of the two daughters of the testator, Frances Farrington Whittemore and Ruth Farrington Leavey, two of the Appellants herein, increase from twenty and five-sixths per cent ($20\frac{5}{6}\%$) to twenty-five per cent (25%) each;

(2) The interest of Appellant Joan Whittemore Close, daughter of Frances Farrington Whittemore, in the principal of the trust estate upon termination of the life estate is increased from thirty-three and one-third per cent ($33\frac{1}{3}\%$) to fifty per cent (50%);

(3) The interests of Appellants Edmond H. Leavey, Jr., and Catharine Farrington Hite, issue of Ruth Farrington Leavey, in the principal of the trust estate upon termination of the life estates are increased from sixteen and two-thirds per cent ($16\frac{2}{3}\%$) to twenty-five per cent (25%) each;

(4) Appellees Beverly Farrington Richardson and John Farrington, the two adopted children not being issue, would not receive fifty-eight and

one-third per cent ($58\frac{1}{3}\%$) of the income of the trust estate, share and share alike, and would not be entitled to thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the principal of the trust estate upon termination of the life estates; and

(5) Appellee Elizabeth P. Farrington would receive fifty per cent (50%) of the income of the trust estate during her life.

The trust estate here involved being substantially in excess of \$500,000, it is clearly apparent from the above itemization of changes in interest revolving around the "fundamental question" in the case that the value in controversy as between individual appellants and individual appellees, both as to the interest of the life income takers and those to share in the distribution of the corpus of the trust estate, are each substantially in excess of the jurisdictional amount of \$5,000.³

B. The Commissions of Trustees.

Section 9757, Revised Laws of Hawaii 1945, as amended by Act 170, Regular Session 1951 (SR D-223), specifies the commissions payable out of income received during the year to trustees, except trustees of a charitable trust, as seven per centum for the first five thousand dollars, and five per centum for all over five thousand dollars. Upon the principal of the estate, trustees and guardians, except trustees of a charitable trust, are allowed as commissions,

³See also footnote 2, page 11 hereof, concerning the true value of the interests here involved.

(1) one per centum on the value at inception of the trust, payable at inception out of principal, (2) one per centum on the value of all or any part of the estate upon final distribution thereof, payable out of principal at termination, (3) two and one-half per centum upon all cash principal received after the inception of the trust payable at time of receipt out of principal, (4) two and one-half per centum upon the final payment of any cash principal prior to termination, payable out of principal at time of final payment, and (5) in addition thereto, one-tenth of one per centum on the value at the expiration of each year during the continuance of the trust payable annually out of principal. This last one-tenth of one per centum does not apply to trust estates created under a trust document which authorizes the trustees to employ others to perform bookkeeping and clerical services at the expense of the trust.

Computing the commissions allowable by statute on income (assuming a reasonable rate of return of even four per cent (4%) on the trust estate of \$500,000) and the amounts allowable out of principal during the continuance of the trust and at the time of the termination thereof, it would appear equally clear that the amount of trustees' commissions here involved meet the jurisdictional requirements under the appeal statute.

Each Appellant controverts the right of all the nominees of Appellees to act. Hence the argument that commissions may be allowable in equal amounts to trustees nominated by Appellants or those nomi-

nated by Appellees, we submit, is not an argument in point so far as the basic questions in the prohibition proceedings and appeal thereof are concerned in relationship to the jurisdictional amount. The failure of Circuit Judge McGregor to disqualify himself and the denial of the writ of prohibition by the court below effectively deprive Appellants of a fair and impartial trial, and Appellants' nominees are completely precluded from realization of trustees' commissions in the amount allowed by statute.

C. The control, custody and management of trust assets and the trust estate.

As we have stated above, the Appellants here controvert the right of all nominees of Appellees to act as trustees. Appellants contend that to permit the vesting of title, custody and control of the trust estate in the nominees of Appellees would thereby jeopardize the entire trust estate and the management of the assets thereof. The value of the entire trust estate is therefore involved so far as the matter of jurisdictional requirements has here been raised.

III.

THE ARGUMENTS OF APPELLANTS SHOW CLEARLY THAT THE CONSTITUTION AND LAWS OF THE UNITED STATES, OR AUTHORITY EXERCISED THEREUNDER, ARE INVOLVED.

A. Due process of law under Fifth Amendment.

We have argued that there is such manifest error in the lower court's interpretation of the affidavit for disqualification and in their "statement or appli-

cation of governing principles”⁴ in the case, that unless the same were corrected the Appellants would be deprived of a trial under circumstances which amounted to a denial of due process of law.

We invite the Court to examine the record from page 135 to 164 and from it the nature of the controversy that exists between the parties and the presence of both the jurisdictional amount and a federal question will be apparent. The record will show that after the filing of a notice of appeal to this Court, together with a bond for costs (R. 136), notwithstanding notification to the Trial Judge and an attempt to have any hearing stayed pending appeal (R. 136), he proceeded to issue contradictory orders as to whether an amended answer pending before him could be filed. He ruled orally that a second amended answer raising substantial issues of fact as to the disqualification of the nominees would be allowed (R. 163) and after a so-called “hearing”, outside the presence of counsel signed a written order that the amended answer could not be filed (R. 114). He proceeded to force counsel into the so-called “hearing” in which there was no opening, no closing and no opportunity for the Appellants to present evidence of any kind. The Court merely announced at 4:25 P.M., on June 6, 1955, “that’s all for the day” (R. 164) and without either party submitting the case or permitting Appellants to offer evidence as required by Hawaiian statute (Section 10117, Revised Laws of Hawaii 1945) entered an order next day prepared by Appellees

⁴*Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938).

and not shown to Appellants (R. 125) appointing the Delegate and her two nominees trustees and purporting to vest legal title in said trustees (R. 115). None of the orders are effective or can become effective until this proceeding is finally determined and the motion for new trial is acted on or made moot.

While it is true that the events that occurred after the denial of the writ of prohibition are not to be read into the affidavit of disqualification, the entire record must be examined in order to determine what the nature of the controversy is and whether the rights of the parties derived from the Federal Constitution and Federal Statutes will, in fact, be violated.

In Appellants' opening brief (p. 22) reference is made to the opinion in *In re Murchison*, 23 Law Week 4219, 99 L. Ed. 552 (1955) (advance reports). The statement of the Supreme Court that a fair trial in a fair tribunal is a "basic requirement of due process" is not limited to criminal cases. It seems clear from not only the opinion in the *Murchison* case, but *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927) (referred to in Appellants' Opening Brief, p. 22-23), that any pecuniary interest of a judge in the decision would constitute the court an unfair and partial tribunal within the prohibition of due process. Mr. Chief Justice Taft, in his very able opinion in the *Tumey* case, reviews the history of judicial disqualification for pecuniary interest and shows that at common law long antedating the Fourteenth Amendment, there was the greatest sensitive-

ness "over the existence of any pecuniary interest however small or infinitesimal in the Justices of the Peace". While in the *Tumey* case the emolument of the court depended upon fines which were to be imposed by the judge, the principles which are stated showing that procedural due process requires a fair trial in a fair tribunal are nevertheless applicable to the case at bar.

In *Payne v. Lee*, 24 N.W. 2d 259 (Minn. 1946), a prohibition proceeding brought to disqualify a probate judge from continuing in a controversy by reason of bias and prejudice, the court specifically held that the denial of a fair and impartial tribunal to adjudicate private rights is in violation of the due process requirement of the United States Constitution:

"The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U.S. Const. Amend. XIV. *Buck v. Bell*, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855; *Stahl v. Board of Supervisors*, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185. In the latter case the Iowa supreme court said (187 Iowa 1352, 175 N.W. 776): 'The constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights.' See Willoughby, *Constitution of the United States*, 2d Ed., §1124; 12 Am.Jr., *Constitutional Law*, §635." (p. 263)

The court further held that even in the absence of a disqualification statute the principle of impartiality, disinterestedness and fairness on the part of

the judge is so much a part of our whole system of judicature that a litigant in a probate proceeding, even though part of the proceeding may be formal or ministerial, is entitled to disqualify a biased judge if judicial functions are involved. The following language of the court seems particularly applicable to the case at bar:

“Some of the most important property rights of the individual citizen and his family are adjudicated in probate administration, and to deny to any litigant therein the unquestioned right to an impartial hearing violates the fundamental traditions of American justice.” (p. 265)

The court quotes with approval *Frome United Breweries Co. v. Keepers, etc. of Bath*, H. L. (1926) A. C. 586, 590, 135 L. T. 482, 483, Lord Chancellor Cave:

“‘. . . if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (*whether financial or other*) in favour of or against either party to a dispute *or is in such a position that a bias must be assumed*, he ought not to take part in the decision or even to sit upon the tribunal.’” (Italics are supplied by the Supreme Court of Minnesota.)

B. A construction of Section 84 of Hawaiian Organic Act (48 U.S.C.A. Sec. 636) is involved.

The briefs for the Appellants and the brief for the Appellees pursuant to the requirement of the rules

of this Court that the statutory provisions involved be reprinted have both set forth the text of Section 84 the Hawaiian Organic Act which imposes a disqualification of any judge in any case "in the issue of which the said judge" has any pecuniary interest.

The Hawaiian case referred to by Appellees, *Carey v. Discount Corporation*, 35 Haw. 786 (1941), involved disqualification under Section 84 of the Organic Act. It was there held that the degree of financial interest was immaterial and an interest however small is sufficient to render a judge disqualified. See same case, 35 Haw. 811, at 813.

We have argued that Judge McGregor has an interest in the issue of the case proceeding before him by reason of his existing relationship to Delegate Farrington.⁵ Delegate Farrington has asserted and Appellants have denied that her adopted children have vested interest in the Farrington estate; and she has asserted and Appellants have denied that she and the nominees are entitled to be trustees of the estate. A decision according with her assertions, it is true, will not directly result in Judge McGregor being appointed or confirmed as a United States Federal District Court Judge. However, in determining the true construction of the pecuniary interest statute we have urged that no matter how infinitesimal, or no matter how small the financial interest may be, the fact that the outcome of the case may have some effect on the application *upon which the Delegate is duty-*

⁵That one of three justices in the court below agreed specifically with this contention (R. 37) should answer any assertion that the argument is "colorable".

bound as the sole representative of the Territory of Hawaii to act, is such a pecuniary interest as to effect a disqualification under the Federal Statute.

The argument that Judge McGregor is exercising power granted under the Federal Statute, namely, the Hawaiian Organic Act,⁶ which creates the court, and that Appellants cannot obtain a fair and impartial trial before him in a Federally created court involve a combination of constitutional and statutory questions. We believe in this case, that the error of the court below was so manifest and so clear that it may not be necessary for the Court to reach problems of either statutory interpretation or the Constitution, but if the ultimate result is to deny to the Appellants a fair and impartial trial before a judge who has no interest in the issues coming before him, it will result in a denial of both constitutional and statutory rights. We believe there is a clear analogy between the case before this Court and *Tumey v. Ohio*, supra. The court there pointed out that one of the duties of the presiding judge was a duty to look after the finances of the village so that he was charged with the responsibility of having a pecuniarily successful court. This was a partisan position which the mayor had at the same time he was attempting to exercise judicial functions. The court uses the following language:

“With his interest as mayor in the financial condition of the village and his responsibility there-

⁶The ten circuit court judges exercise judicial power under 48 U.S.C. § 631, § 633 (Organic Act Section 81, 80).

for, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above of the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

Judge McGregor occupies two seriously inconsistent positions, one partisan, that is, a position of candidate for judicial office in which he can only be successful by some approving action taken by one of the litigants before him; the other judicial, in which he is bound to determine impartially a serious family and property controversy pending before him. We submit that the determination of this delicate question of constitutionality and statutory law cannot be avoided by a statement that the Constitution and statute "are not involved".

CONCLUSION.

A. The Writ of Prohibition is the machinery provided by local law by which an upper court determines whether a lower court is competent to act in a particular matter. The Appellants claim that unless Judge McGregor is restrained, they will not receive a fair trial of Appellants' claims which involve not

only the determination of who shall be Trustees, but involve the adjudication of substantial property rights of a value greatly in excess of the jurisdictional amount. Appellees have cited no authority and it would be subverting the purpose of the Act of Congress if this Court could not, in determining the value in controversy, look to the actual controversy in which Appellants are attempting to obtain the benefit of a fair trial.

B. The requirement of impartiality, disinterestedness and fairness on the part of the judge is so interwoven with the history of social control through our court system, that the denial of the Writ would deny to the Appellants procedural due process required by the Fifth Amendment.

C. The appeal raises a substantial question as to the meaning of Section 84 of the Organic Act.

Wherefore, Appellees' Motion to Dismiss should be denied.

Dated, Honolulu, Hawaii,
January 25, 1956.

Respectfully submitted,

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No. 14,843

IN THE
United States Court of Appeals
For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS.**

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Appellees.

On Appeal from the Supreme Court
of the Territory of Hawaii.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS.**

PRELIMINARY STATEMENT.

Appellees moved to dismiss this appeal because appellants have failed to establish the necessary amount in controversy conferring jurisdiction on this Court. The motion to dismiss, as well as the merits of the appeal were argued on January 12, 1956.

STATUTORY PROVISION.

The statute conferring jurisdiction on this Court to review final judgments of the Supreme Court of Hawaii provides:

The courts of appeals for the First and the Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds \$5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929 (28 U.S.C. 1293.)

QUESTIONS PRESENTED.

Did the original petition for writ of prohibition filed in the Supreme Court of Hawaii to stay the circuit judge in a separate court from proceeding in a case before him on the ground of disqualification involve any "value in controversy" to support this Court's jurisdiction on appeal?

Do the assertions of questions arising under the Constitution and laws of the United States, made for the first time in this Court and based upon an unsupported claim that the circuit judge is pecuniarily interested in the issue of the case before him, raise substantial federal questions to support the jurisdiction of this Court on appeal?

We submit that both questions should be answered in the negative.

ARGUMENT.

I. NO AMOUNT OF \$5,000 OR ANY OTHER SUM OF MONEY IS INVOLVED IN THIS APPEAL.

Appellants apparently concede that the prohibition proceeding itself does not involve a controversy over rights which can be measured in money. Nor could they assert otherwise. How evaluate their alleged right to have a judge other than Judge McGregor appoint trustees of the Farrington Estate? The leading case of *Barry v. Mercein*, 15 U.S. (5 How.) 118 (1846), involved a petition for writ of habeas corpus whereby petitioner sought control of his daughter then in the custody of his estranged wife. The Act of 1789, 1 Stat. 84, c. 20, Sec. 22, permitted the Supreme Court to review final judgments of the circuit courts when the matter in dispute exceeded \$2,000. Chief Justice Taney pointed out that the Supreme Court had only such appellate jurisdiction as was conferred upon it by act of Congress. Construing the act, he held that

The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no

words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond these limits, and authorize us to take cognizance of cases to which no test of money value can be applied. (p. 120).

The claim for custody was incapable of being reduced to any pecuniary standard and the writ of error was dismissed.

This Court reached the same result in *Sumi v. Young*, 83 F. 2d 752 (9th Cir. 1936), aff'd. 300 U.S. 251 (1937), involving an appeal from the United States District Court of Alaska.

Where the Supreme Court of the Territory of Montana issued a writ of mandamus commanding the governor and others to recanvass votes cast for the change of location of the territorial capitol, an appeal was dismissed because the matter in dispute was not "money, or some right the value of which in money can be calculated and ascertained."

Potts v. Chumasero, 92 U.S. (2 Otto) 358.

Accord:

First National Bank of Youngstown v. Hughes, 106 U.S. 523 (1882). (Injunction against production of corporate records. Alleged damage to business too speculative.)

In re Red Cross Line, 277 Fed. 853 (S.D. N.Y. 1921). (Action for specific performance of arbitration does not draw jurisdictional amount from claim to be arbitrated. Amount involved nominal.)

Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941). (Matters not susceptible of pecuniary valuation arising out of alleged wrongful discharge.)

Confronted with the jurisdictional deficiency, appellants have sought to look beyond the present case to find some way to stay in court. They ask the Court to look to the circuit court case still pending before Judge McGregor (the one that came to a halt when the petition for writ of prohibition was filed, and again upon the filing of this appeal) to find the requisite value in controversy. By tortuous reasoning, they argue that the Hawaii Supreme Court had jurisdiction to issue the writ and that writs of prohibition may be employed as an auxiliary process to give full effect to existing appellate authority, citing *Minnesota & Ontario Paper Co. v. Molyneaux*, 70 F. 2d 545 (8th Cir. 1934) (Appellants' Memorandum p. 4). The gulf between territorial and federal jurisdiction vanishes as appellants argue that the test of the jurisdiction here is whether the Court would have jurisdiction over the circuit court case if it were appealed to the Supreme Court of Hawaii and a further appeal were taken from a final judgment in that court (Memo. p. 5).

This extraordinary maneuver of logic is accomplished by analogy. The prohibition proceeding, it is argued, may be deemed "ancillary" to the circuit court action, since the writ would be in aid of appellate jurisdiction; this being so, the "ancillary"

proceeding may draw its federal jurisdiction requirements from the circuit court case, on the analogy of the well-established ancillary-proceeding doctrine in the federal courts.

In reaching this conclusion, appellants overlook the fact that the instant case comes to the threshold of federal jurisdiction for the first time on this appeal. The circuit court case is not within the cognizance of this court at the present time, nor will it be until all territorial trial and appellate proceedings are completed.

Section 1293, *supra*, requires that the value in controversy exceeds \$5,000. As Justice Stone said, in *Healy v. Ratta*, 292 U.S. 263 (1934), construing a substantially similar statute:

The policy of the statute calls for its strict construction . . . Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. (p. 270).

The "value in controversy" has reference "to the matter which is directly in dispute in the particular cause in which the judgment or decrees sought to be reviewed has been rendered . . ."

Town of Elgin v. Marshall, 106 U.S. 578, 579-80 (1882).

In the present case, the matter directly in dispute is the original petition for writ of prohibition on the ground of disqualification, and not the circuit court case.

The conclusion of appellants' analogical argument, is that the present action is ancillary to the circuit court action. It can support the jurisdiction of this Court on appeal because the primary action, although not in a federal court, can supply the missing jurisdictional requirements. The present case affords the final judgment required by Section 1293. The circuit court case provides the jurisdictional amount. Instead of the so-called ancillary action partaking of the established jurisdiction of the primary action, appellants would have the ancillary action originate federal jurisdiction while its primary action remains outside federal power.

The analogy grows more misshapen as the federal cases relating to ancillary jurisdiction are examined. The petition for writ of prohibition is not ancillary to the circuit court case in the sense used in the field of federal jurisdiction. To be ancillary in that sense, the controversy must deal with property or assets actually or constructively in the court's possession or control. *Fulton National Bank of Atlanta v. Hozier*, 267 U.S. 276 (1925). Obviously, the petition for the writ does not purport to deal with any property in the control of the circuit court. Furthermore, federal jurisdiction must have been established in the principal suit, and the ancillary action must be brought in the same court. An action in one federal district court will not be deemed ancillary to a principal action pending in another district.¹

Raphael v. Trask, 194 U.S. 272 (1904).

¹There are certain exceptions with respect to receiverships and bankruptcies not here relevant.

See also:

Sullivan v. Swain, 96 Fed. 259 (S.D. Cal. 1899);
U.S. ex rel. Lambert v. Pedarre, 262 Fed. 839
 (E.D. La. 1920);

Applegate v. Applegate, 39 F. Supp. 887 (E.D.
 Va. 1941).

Where an attempt was made to support federal jurisdiction in an ancillary action by jurisdictional facts drawn from the primary action pending in a state court, Justice Brandeis held in *Mitchell v. Maurer*, 293 U.S. 237 (1934), that

where primary receivers appointed by a state court bring a suit for the appointment of ancillary receivers in the federal court * * * Obviously such an application is not ancillary to any proceedings in any federal court. It is an independent, original bill. Being such, it cannot be sustained when diversity of citizenship does not exist and no other ground of federal jurisdiction is shown. (pp. 243-44.)

This case bears a close relationship to the present one because it exemplifies the ancillary action seeking to support federal jurisdiction from a primary action, outside the scope of federal power.

In *Alesna v. Rice*, 172 F. 2d 176 (9th Cir. 1949), this Court held that the Hawaiian Organic Act (48 U.S.C. Sections 642, 645) places the courts of Hawaii in the same position in relation to the federal judicial system as state courts. It follows from *Mitchell v. Maurer*, *supra*, therefore, that appellants may not sustain the appellate jurisdiction of this

court by reference to a separate case pending in the Hawaiian circuit court.

In any event, reference to the circuit court proceeding would not remedy the deficiency of jurisdictional amount in this appeal. Appellants argue that the circuit judge must decide preliminary questions relating to interests in the trust estate before he can appoint trustees. These issues, it is said, will be concluded by the decree and hence the value in controversy includes the value of the property rights affected by the decision on such preliminary issues. But the determination of these issues is collateral to the appointment of trustees, which is the relief sought, and is necessary only to decide the applicability of Section 12572, Revised Laws of Hawaii 1945, to the appointment.²

Although a judgment on the questions relating to the interests of the parties in the trust might be res judicata in any subsequent proceeding, appellants may not use the value of those property interests to compute the value in controversy.

Thus, in *The Jesse Williamson, Jr.*, 108 U.S. 305 (1882), an admiralty action in rem, the fact that libellant might have a personal judgment against the owners for a substantial sum which would be conclusive upon them did not establish the requisite jurisdictional amount where the value of the vessel which was the subject of the action was stipulated to be less than the sum required to establish juris-

²See Brief for Appellees, pp. 2-3 and Appendix I.

diction so that final judgment would be for less than the required amount.

And in *New Jersey Zinc Co. v. Trotter*, 108 U.S. 564 (1883), an appeal in a trespass action for less than the jurisdictional amount was dismissed despite the fact that title to land having a value far in excess of the required sum was actually litigated and the judgment would be conclusive on the question of title.

In the circuit court case, the only matter actually in dispute is the identity of successor trustees. The court has already decided what parties have vested interests in the estate. This was necessary to determine the procedure for appointment of trustees. This determination will be conclusive on all parties as an estoppel by judgment except, of course, for appellants' right to appeal to the Supreme Court of Hawaii. Nevertheless, appellants would not be entitled to use the value of the rights thus decided in seeking to establish this Court's jurisdiction, even if they were permitted to refer to the territorial court as a fount of federal jurisdiction. *Town of Elgin v. Marshall*, 106 U.S. 578 (1882).

Commissions of prospective trustees cannot be used to support federal jurisdiction. Appellants claim the rights to name the trustees and to prevent appellees' nominees from being appointed. The commissions to be paid the trustees are in no way drawn into controversy. The asserted rights of appellants in the circuit court case have no measure in money; they do not have the pecuniary value to support jurisdiction. *Barry v. Mercein, supra*.

In summary, we submit that the proceeding for writ of prohibition does not involve a controversy over pecuniary value sufficient to support this appeal; that jurisdictional facts cannot be borrowed from the proceeding still pending in the territorial circuit court; and that the circuit court proceedings themselves would not permit appellants to cross the jurisdictional boundaries set by Section 1293 for appeal to this Court.

II. THIS APPEAL POSES NO SUBSTANTIAL QUESTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

The motion for disqualification filed by appellants in the circuit court stated in part:

The grounds for this motion are that the Honorable Calvin C. McGregor is disqualified under Section 9573 of the Revised Laws of Hawaii, 1945 . . . (R. 10-a).

The petition for writ of prohibition asserted that the

Circuit Judge is disqualified as a matter of law under said section 9573 from proceeding further in said Civil No. 139, as more particularly appears from said affidavit. (R. 7).

The opinion of the Supreme Court of Hawaii dealt solely with the construction of Section 9573, the territorial statute, and its application to the petition before the court (R. 11-28).

The petition for rehearing in the Supreme Court of Hawaii (R. 39-45) raised the question of the applicability of Section 9603, R.L.H. 1945, in the light of what appellants deemed a violation of the Canons of Judicial Ethics by the circuit judge. Although the petition for rehearing quotes at length from a United States Supreme Court opinion dealing with due process in a criminal case (R. 41), it raised no question of deprivation of any constitutional rights. Nor did it raise any question of disqualification under Section 84 of the Hawaiian Organic Act, although it mentions pecuniary interest in connection with the court's power of general superintendence (R. 43). In its decision denying the petition for rehearing, the court pointed out that the petition "presents no new matter that has not been previously considered by the court" (R. 48). The court ruled that Section 9603 had no bearing on the case.

Appellants raised the question of disqualification under Section 84 of the Organic Act for the first time in their Statement of Points on Appeal (R. 165). No constitutional question was raised. In fact, appellants asserted that a constitutional question is involved for the first time in their Memorandum in Opposition to the Motion to Dismiss, pp. 15-18.

The court of appeals of the first circuit dismissed the appeal in *Ramos v. Leahy*, 111 F. 2d 955 (1st Cir. 1940) under much the same circumstances. The governor of Puerto Rico removed the mayor of Manati under territorial law. The mayor lost his appeal to the Supreme Court of Puerto Rico and

his motion for consideration was denied without opinion. He then appealed to the court of appeals, asserting for the first time that he had been denied due process of law and that his removal violated the Puerto Rican Organic Act. The court in a per curiam opinion pointed out that the questions had not been presented to the lower court, and dismissed the appeal.

It is not enough that a federal question be 'lurking in the record.' (p. 956.)

Indeed, appellants are hard put to find even a lurking federal question. They refer to matters which transpired after the entry of final judgment and seek to draw an inference of lack of due process (Memorandum in Opposition to Motion to Dismiss, p. 15). Appellees' motion to strike these portions of the record were denied on technical grounds, but not without a vigorous dissent by Justice Rice pointing out that these matters

were not before or a part of the record of this supreme court or given consideration by us when our rulings were made which, respectively denied the petition for writ of prohibition herein and for a rehearing thereof . . . (Brief for Appellees, Appendix III, pp. vii-viii).

Even assuming error in these subsequent proceedings, they cannot be made to support a constitutional question on the appeal from the judgment of the Supreme Court rendered before they took place. And certainly the decision and judgment of the Supreme Court itself construing Section 9573, R.L.H. 1945,

and denying the writ of prohibition on the ground that the affidavit of disqualification was insufficient, is not a basis for a claim of lack of due process. That court took jurisdiction, reviewed the affidavit of disqualification in the light of the territorial statute, and construing the latter, denied the writ because the affidavit was insufficient. There can be no deprivation of the constitutional right to a fair trial by virtue of judicial disqualification where said disqualification has been found not to exist.

In dwelling upon *Tumey v. Ohio*, 273 U.S. 519 (1926), in their memorandum, appellants are engaging in another farfetched analogy. That case involved an Ohio procedure whereby the town mayor would hear prohibition law violations and would be compensated out of fines and costs collected from convicted violators. It holds that a defendant in a criminal case suffers a deprivation of due process of law where the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." This salutary principle is immaterial to the present case. The circuit judge in the trial court has no interest, direct or indirect, pecuniary or other, in the outcome of the Farrington Estate controversy, and the affidavit of disqualification alleged none.

The argument now made is that the circuit judge if he favors Mrs. Farrington as delegate to Congress, will be increasing his chances of appointment to the federal bench. If he is so appointed, his salary will be increased. Even in appellants' view, the alleged

pecuniary interest of the judge is not in the issue of the case. It is in the relationship of the judge and the litigant. This relationship has been held by the Hawaiian Supreme Court to be not disqualifying under the Hawaii disqualification statute. As Chief Justice Taft said in the *Tumey* case, *supra*:

All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative policy. (273 U.S. p. 523).

The alleged question arising under Section 84 of the Organic Act also hinges upon a finding of direct pecuniary interest on the part of the judge in the issue before him. We submit no such interest has been shown. Appellants use a misleading footnote in their memorandum (Memorandum in Opposition to Motion to Dismiss, p. 19, fn. 1) claiming that the dissenting judge in the court below found such a disqualifying pecuniary interest and therefore the assertion of federal question is more than "colorable." However, a careful examination of the dissenting opinion (R. 29-38) reveals that the judge did not even mention Section 84 as a ground of disqualification under the facts of this case. In *Carey v. Discount Corporation*, 35 Hawaii 786 (1941), the court construed disqualification under Section 84 of the Hawaiian Organic Act to depend "upon facts capable of being precisely averred and proved, and thus put in issue and tried." Appellants have made no precise averment of the judge's pecuniary interest in the

issue of the case. The suggestions made initially in this Court in the effort to support federal jurisdiction raise not substantial federal question and should not obstruct the dismissal of the appeal for want of jurisdiction.

CONCLUSION.

The jurisdiction of this Court on appeal is clearly defined by statute. That statute should be strictly construed. Appellants have the burden of establishing and sustaining the jurisdiction of this Court. They must show either that the case involves a value in controversy in excess of \$5,000, or a substantial question under the Constitution or laws of the United States. They have shown neither, and the motion to dismiss should be granted.

Dated, Honolulu, Hawaii,
February 10, 1956.

Respectfully submitted,

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